Term: Fall 2016

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	6300	PR	Civil Procedure	A	5.000	20.000	
LAW	6703	PR	Torts	B+	4.000	13.332	
LAW	6790	PR	Lawyering & Legal Writing I	A-	1.000	3.667	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	10.000	10.000	10.000	10.000	36.999	3.699
Cumulative:	20.000	20.000	20.000	20.000	71.333	3.566

Unofficial Transcript

Term: Spring 2017

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	6403	PR	Property	A-	5.000	18.335	
LAW	6501	PR	Constitutional Law I	A	3.000	12.000	
LAW	6791	PR	Lawyering & Legal Writing II	A-	2.000	7.334	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	10.000	10.000	10.000	10.000	37.669	3.766
Cumulative:	30.000	30.000	30.000	30.000	109.002	3.633

Unofficial Transcript

Term: Fall 2017

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7118	PR	Criminal Procedure	A+	3.000	12.999	
LAW	7441	PR	Trusts & Estates	A-	3.000	11.001	
LAW	7759	PR	Ethics in Litigation	A+	2.000	8.666	
LAW	7769	PR	Fed Crim Lit (SDNY) Field Clnc	P	2.000	0.000	
LAW	7770	PR	Fed Crim Lit SDNY Fld Clnc Sem	P	2.000	0.000	
LAW	7900	PR	Teaching Assistant	P	1.000	0.000	
LAW	7939	PR	Law Review	P	0.000	0.000	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	8.000	32.666	4.083
Cumulative:	43.000	43.000	43.000	38.000	141.668	3.728

Unofficial Transcript

Term: Spring 2018

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7939	PR	Law Review	P	1.000	0.000	
LAW	7950	PR	Judicial Clerkship	P	10.000	0.000	
LAW	7951	PR	Alexander Fellows Seminar	A-	2.000	7.334	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	13.000	13.000	13.000	2.000	7.334	3.667
Cumulative:	56.000	56.000	56.000	40.000	149.002	3.725

Unofficial Transcript

Term: Summer 2018

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7898	PR	Patent Basics	P	2.000	0.000	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	0.000	0.000	0.000
Cumulative:	58.000	58.000	58.000	40.000	149.002	3.725

Unofficial Transcript

Term: Fall 2018

College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7330	PR	Evidence	A	4.000	16.000	
LAW	7342B	PR	Conflict of Laws	A-	3.000	11.001	
LAW	7557	PR	Antitrust	A-	3.000	11.001	
LAW	7992	PR	E-Discovery	A	2.000	8.000	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	12.000	46.002	3.833
Cumulative:	70.000	70.000	70.000	52.000	195.004	3.750

Unofficial Transcript

Term: Winter 2019

College: Cardozo School of Law
Major: Law

Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7708	PR	Collaborative Family Law	P	1.000	0.000	
LAW	7790	PR	Advanced Legal Research	P	1.000	0.000	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	2.000	2.000	2.000	0.000	0.000	0.000
Cumulative:	72.000	72.000	72.000	52.000	195.004	3.750

Unofficial Transcript

Term: Spring 2019
College: Cardozo School of Law
Major: Law
Student Type: Continuing
Academic Standing:

Subject	Course	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	7060	PR	Corporations	B	4.000	12.000	
LAW	7104	PR	Criminal Trial Practice	A	2.000	8.000	
LAW	7256	PR	European Legal Insts/Holocaust	A-	2.000	7.334	
LAW	7711	PR	Family Law	A-	3.000	11.001	
LAW	7900	PR	Teaching Assistant	P	1.000	0.000	

Term Totals (First Professional)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	12.000	12.000	12.000	11.000	38.335	3.485
Cumulative:	84.000	84.000	84.000	63.000	233.339	3.703

Unofficial Transcript

RELEASE: 8.7.1

University of Pittsburgh

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UNDERGRADUATE ACADEMIC TRANSCRIPT

University of Pittsburgh

DocumentID:14458652

Scott T Christopher
Student ID: 3037603

Institution: University of Pittsburgh
4200 Fifth Avenue
Pittsburgh, PA 15260
Print Date: 07/18/2017

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 04/28/2012
Degree GPA: 2.457
Plan: Political Science

Academic Program History

Program: College of Arts and Sciences
12/29/2004: Undeclared Major

Program: School of Arts and Sciences
03/24/2006: Political Science Major

Program: School of Arts and Sciences
03/24/2006: Political Science Major
03/24/2006: Economics Major

Program: Arts and Sciences Name Change
03/07/2009:

Program: Dietrich Sch Arts and Sciences
01/17/2012: Political Science Major

Beginning of Undergraduate Record

Fall Term 2005-2006

Course		Description	Attempted	Earned	Grade	Points
CMNAVS	0100	NAVAL LABORATORY	1.00	1.00	A	4.000
Course Topic:		TAKEN AT CARNEGIE MELLON UNIV				
CMNAVS	0101	INTRODUCTION TO NAVAL SCIENCE	2.00	2.00	A	8.000
Course Topic:		TAKEN AT CARNEGIE MELLON UNIV				
ECON	0100	INTRO MICROECONOMIC THEORY	3.00	3.00	C+	6.750
ENGCMP	0200	SEMINAR IN COMPOSITION	3.00	3.00	A	12.000
FS	0001	CAS ORIENTATION	1.00	1.00	S	0.000
MUSIC	0711	HISTORY OF JAZZ	3.00	3.00	A	12.000
PS	0200	AMERICAN POLITICAL PROCESS	3.00	3.00	A	12.000
PSY	0010	INTRODUCTION TO PSYCHOLOGY	3.00	3.00	B+	9.750

Spring Term 2005-2006

Course		Description	Attempted	Earned	Grade	Points
ASTRON	0089	STARS, GALAXIES AND THE COSMOS	3.00	3.00	B	9.000
CMNAVS	0102	SEAPOWER AND MARITIME AFFAIRS	2.00	2.00	B	6.000
Course Topic:		TAKEN AT CARNEGIE MELLON UNIV				
ECON	0110	INTRO MACROECONOMIC THEORY	3.00	3.00	B+	9.750
ENGWRT	0550	INTRODUCTION TO JOURNALISM	3.00	3.00	A	12.000
HIST	1783	GREEK HISTORY	3.00	3.00	A-	11.250
MATH	0120	BUSINESS CALCULUS	4.00	4.00	C	8.000
PEDC	0225	BUDO	1.00	0.00	I	0.000

Summer Term 2005-2006

Course		Description	Attempted	Earned	Grade	Points
STAT	0200	BASIC APPLIED STATISTICS	4.00	4.00	C	8.000

Fall Term 2006-2007

Course		Description	Attempted	Earned	Grade	Points
CMNAVS	0201	LEADERSHIP AND MANAGEMENT	3.00	3.00	A	12.000
Course Topic:		TAKEN AT CARNEGIE MELLON UNIV				
CMNAVS	0400	NAVAL LABORATORY	1.00	1.00	A	4.000
Course Topic:		TAKEN AT CARNEGIE MELLON UNIV				
HIST	0600	UNITED STATES TO 1877	3.00	3.00	B+	9.750
JPNSE	1057	JPNSE CULT & SOCTY THRGH CINEM	3.00	3.00	A-	11.250
MATH	0220	ANALYTC GEOMETRY & CALCULUS 1	4.00	0.00	W	0.000
PS	1212	AMERICAN PRESIDENCY	3.00	3.00	A-	11.250
PS	1352	INTRODUCTION TO AFRCN POLITICS	3.00	3.00	A	12.000

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University Registrar

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UNDERGRADUATE ACADEMIC TRANSCRIPT

University of Pittsburgh

DocumentID:14458652

Scott T Christopher
Student ID: 3037603

Spring Term 2006-2007

Course		Description	Attempted	Earned	Grade	Points
ENGLIT	0597	BIBLE AS LITERATURE	3.00	0.00	F	0.000
Repeated:		Repeated - Excluded from GPA				
MATH	0220	ANALYTC GEOMETRY & CALCULUS 1	4.00	4.00	D-	3.000
PS	0300	COMPARATIVE POLITICS	3.00	3.00	D	3.000
PS	1235	MEDIA AND POLITICS	3.00	0.00	W	0.000
PS	1321	LATIN AMERICAN POLITICS	3.00	3.00	C-	5.250

Summer Term 2006-2007

Course		Description	Attempted	Earned	Grade	Points
CLASS	1220	ROMAN HISTORY	3.00	3.00	D+	3.750
HIST	0100	WESTERN CIVILIZATION 1	3.00	3.00	C	6.000
PS	1202	AMERICAN CONSTITUTIONAL LAW	3.00	3.00	B	9.000

Fall Term 2007-2008

Course		Description	Attempted	Earned	Grade	Points
ADMJ	1400	INTRODUCTION TO CRIMINAL LAW	3.00	0.00	G	0.000
HIST	1116	INTRO TO THE RENAISSANCE	3.00	0.00	F	0.000
Req Designation:		Writing Option				
HIST	1120	BRITISH ISLES	3.00	3.00	D	3.000
PS	1523	EAST ASIA IN WORLD POLITICS	3.00	3.00	B-	8.250
PS	1601	POLITC THEORY PLATO-MACHIVELI	3.00	3.00	A	12.000

Spring Term 2007-2008

Course		Description	Attempted	Earned	Grade	Points
ADMJ	1220	DEVIANCE AND THE LAW	3.00	0.00	W	0.000
ADMJ	1300	INTRODUCTION TO CORRECTIONS	3.00	0.00	W	0.000
ANTH	0534	PREHSTRC FDS OF EURPN CIVILZTN	3.00	0.00	W	0.000
ENGLIT	0597	BIBLE AS LITERATURE	3.00	0.00	F	0.000
Repeated:		Repeated - Excluded from GPA				
PHIL	0080	INTRO TO PHILOSOPHCAL PROBLEMS	3.00	0.00	W	0.000
PS	1353	AFRICAN LIBERATION MOVEMENTS	3.00	0.00	F	0.000

Fall Term 2008-2009

Course		Description	Attempted	Earned	Grade	Points
ADMJ	1205	INTRODUCTION POLICE MANAGEMENT	3.00	0.00	W	0.000
ENGLIT	0590	FORMATIVE MASTERPIECES	3.00	0.00	W	0.000
HIST	1197	BLACK DEATH: PLAGUE & HISTORY	3.00	0.00	F	0.000
PHIL	0300	INTRODUCTION TO ETHICS	3.00	0.00	I	0.000

Fall Term 2009-2010

Course		Description	Attempted	Earned	Grade	Points
ANTH	0536	MESOAMERICA BEFORE CORTEZ	3.00	0.00	F	0.000
ECON	0400	LABOR AND THE ECONOMY	3.00	0.00	G	0.000
ENGLIT	0562	CHILDHOOD'S BOOKS	3.00	3.00	B+	9.750
HIST	1110	MEDIEVAL HISTORY 1	3.00	3.00	A-	11.250
PHIL	0320	SOCIAL PHILOSOPHY	3.00	0.00	W	0.000

Spring Term 2009-2010

Course		Description	Attempted	Earned	Grade	Points
ASTRON	0087	BASICS OF SPACE FLIGHT	3.00	0.00	F	0.000
ENGLIT	0321	FORMS OF PROSE	3.00	0.00	W	0.000
Req Designation:		Writing Option				
HIST	0795	HISTORY OF AFRICA BEFORE 1800	3.00	0.00	F	0.000
HIST	1111	MEDIEVAL HISTORY 2	3.00	0.00	I	0.000
PHIL	0500	INTRODUCTION TO LOGIC	3.00	0.00	W	0.000
PS	1381	CAPSTONE SEMINAR COMP POLITICS	3.00	0.00	W	0.000
Req Designation:		Writing Option				
Course Topic:		PRESIDENTS & POL DVLP LAT AM				

Fall Term 2010-2011

Course		Description	Attempted	Earned	Grade	Points
ANTH	0681	INTRODUCTION TO HUMAN EVOLUTN	3.00	0.00	W	0.000
ENGLIT	0597	BIBLE AS LITERATURE	3.00	3.00	D-	2.250
HIST	0302	SOVIET RUSSIA	3.00	0.00	F	0.000
PS	1281	CAPSTONE SEM AMERICAN POLITICS	3.00	0.00	W	0.000
Req Designation:		Writing Option				
Course Topic:		THE UNITED STATES CONGRESS				

Fall Term 2011-2012

Course		Description	Attempted	Earned	Grade	Points
ADMJ	1234	INTRODUCTION TO CYBERCRIME	3.00	3.00	A	12.000
ANTH	0538	THE ARCHELOGST LOOKS AT DEATH	3.00	3.00	A-	11.250
GEOL	0871	INTELLGNT LIFE IN THE UNIVERSE	3.00	3.00	B-	8.250

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UNDERGRADUATE ACADEMIC TRANSCRIPT

University of Pittsburgh

DocumentID:14458652

Scott T Christopher
Student ID: 3037603

Spring Term 2011-2012

Course		Description	Attempted	Earned	Grade	Points
GEOL	0800	GEOLOGY	3.00	3.00	B-	8.250
HIST	0788	WOMEN & MEN IN ANCNT MEDIT	3.00	3.00	C	6.000
HIST	0789	WOMEN MEN ANCT MEDT/WRIT PRAC	1.00	1.00	C	2.000
Req Designation:		Writing Option				
PHIL	0080	INTRO TO PHILOSOPHCAL PROBLEMS	3.00	3.00	B	9.000
PS	1381	CAPSTONE SEMINAR COMP POLITICS	3.00	3.00	B-	8.250
Req Designation:		Writing Option				
Course Topic:		PUBLIC POLICY WESTERN EUROPE				
PSY	1205	ABNORMAL PSYCHOLOGY	3.00	3.00	A-	11.250

Undergraduate Career Totals

Cum GPA:	2.457	Cum Totals:	189.00	125.00	341.500

Transfer Credits

Transfer Credit from La Roche College
Applied Toward Dietrich Sch Arts and Sciences

			Attempted	Earned	Points
Course Trans GPA:	0.000	Transfer Totals:	6.00	6.00	0.000

----- End of Transcript -----

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University Registrar

Send To: Scott Christopher

TRANSCRIPT GUIDE

In September 2005, the University implemented a new student administration computer system resulting in the change to some historic terminology. Depending on the status of the student at the time the transcript is produced, the transcript labels may contain either current or historic terminology. These wording changes follow with the historic terminology in parentheses: Career (Level); Program (Academic Center); Plan (Major/Minor); Subplan (Area of Concentration); GPA (QPA).

GRADING POLICY

The following are grades and grade/quality points associated with each grade:

A+	4.00	C+	2.25
A	4.00	C	2.00
A-	3.75	C-	1.75
B+	3.25	D+	1.25
B	3.00	D	1.00
B-	2.75	D-	0.75
		F	0.00

The following grades carry no grade/quality points:

- G Unfinished Course Work
- H Honors
- HS High Satisfactory
- I Incomplete
- LS Low Satisfactory
- N Audit
- NC No Credit
- R Resignation
- S Satisfactory
- T Test Credit
- U Unsatisfactory
- W Withdrawal

The following are discontinued grades:

- K Competent Attainment
- P Pass
- Q Qualified
- WF Withdrawal/Failing
- Z Invalid Grade
- ** No grade Reported

Note: Plus and minus grades were added to the University's grading system in the Winter Term 1975-1976.
For additional grade information please see the University grading policy online.

SPECIAL NOTATIONS (Applies only to students who attended prior to Fall Term 2005-2006).
1. Indicates that the course was repeated. The credits and quality points earned in this course are not used in the calculation of the QPA.
2. Indicates that the course was offered through the University Honors College
3. Indicates that the course was taken at one or more of the institutions participating in the University of Pittsburgh cross-registration program. Decode for the abbreviations are:

- **CAR** Carlow University (formerly Carlow College)
- **CMU** Carnegie-Mellon University
- **CHA** Chatham University (formerly Chatham College)
- **CCA** Community College of Allegheny County
- **DUQ** Duquesne University
- **LAR** La Roche College
- **PTS** Pittsburgh Theological Seminary
- **PPU** Point Park University (formerly Point Park College)
- **RMU** Robert Morris University (formerly RMC Robert Morris College)
- **SE** Seton Hill University (formerly Seton Hill College)
- **WC** Westmoreland County Community College

GPA/QPA POLICY: Prior to the Fall Term 2005-2006, the University cumulative Quality Point Average (QPA) was calculated based on all University of Pittsburgh courses relevant to the student's degree goal(s). Effective with the Fall Term 2005-2006, the cumulative Grade Point Average (GPA) is associated with credits completed at the Career Level. *For additional QPA/GPA information, please see the University GPA/QPA policy online.*

THREE-TERM CALENDAR: The University of Pittsburgh utilizes a three-term academic calendar which is equivalent to the semester-hour system. The first-professional programs operate on the semester calendar.

ACCREDITATION: The University of Pittsburgh is accredited by the Middle States Association of Colleges and Schools, Commission on Higher Education. Individual school or program accreditation may be verified by contacting the Dean's Office of the Academic Center/Program identified on the student's record.

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COURSE NUMBERING SYSTEM
Effective Fall Term 1990-1991

0001-0999 and 7000-7999	Lower Level Undergraduate
1000-1999 and 8000-8999	Upper Level Undergraduate
2000-2999	Master Level Graduate
3000-3999	Doctoral Level Graduate
4000-4999	Noncredit
5000-5999	First Professional Programs (Medicine, Dental Medicine, Law)
6000-6999	Career Development Undergraduate
9000-9999	Career Development Graduate

Prior to Fall Term 1990-1991

0001-0099	Lower Level Undergraduate
0010-0099	First Year Sectioned Courses (Law)
0100-0199	Upper Level Undergraduate
0100-0399	Upper Level Electives (Law)
0200-0299	Master Level Graduate
0300-0399	Doctoral Level Graduate
0400-0499	Third Year Limited Enrollment Courses (Law)
0500-0599	First Professional Programs (Medicine and Dental Medicine)
0500-0699	Upper Division Seminars (Law)
0700-0799	Lower Level (General Studies)
0800-0899	Upper Level (General Studies)
0900-0999	Other
0900-0999	Activities for Credit (Law)

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Eric S. Hochstadt
office (212) 310-8538
eric.hochstadt@weil.com

April 11, 2022

Dear Judge,

Re: Scott Christopher's Application for a Judicial Law Clerkship

I am a partner in the New York office of Weil, Gotshal & Manges LLP. I have been with the firm since 2003, with the exception of one year when I left the firm in 2006 after my third-year as an associate to serve as a judicial law clerk to the Honorable Loretta A. Preska in U.S. District Court for the Southern District of New York. I specialize in litigation and I am in the firm's antitrust practice group.

I have known Scott Christopher since he joined the firm and our antitrust practice group in September 2019. My strong recommendation of Scott is based on my personal experience supervising him on various matters for a number of different clients. In particular, I have gotten to know Scott very well working with him on a civil antitrust, post-merger investigation of a life sciences client's transaction by the Federal Trade Commission. The matter has covered a range of procedural and substantive issues, as well as direct client engagement and written advocacy. In particular, Scott has led our team's efforts to develop and gather the facts with the client, playing an active role in interviews of the client's most senior executives. Scott also has managed the electronic discovery review and seen first-hand a number of the issues that come up in today's large-scale document collections and reviews, ranging from technology-assistance to contract attorneys to privilege issues. Finally, Scott has led the team in identifying and marshaling the most compelling facts to prepare various advocacy written submissions to the government, as well as the narrative responses for specifications in the civil investigative demand. In all of these interactions, Scott has met deadlines, managed a number of people and projects, and communicated well internally and with the client.

Beyond the substance, Scott came to law as a second career and he has hit the ground running with a unique level of professionalism and focus. Scott also has been a real mentor to our junior attorneys. He also has been an asset to our firm with his significant pro bono contributions (on a trial team that secured a complete victory for a victim of domestic violence who fled to the United States with her child where she applied for asylum and efforts to recruit and attract talented attorneys through our summer program. Finally, Scott is hard-working, personable, and humble. He has been a consummate team player and I have never seen a task that is too small for him.

As a former judicial law clerk who had three years of prior large law firm work experience, I am firmly convinced that Scott's substantial and impressive work experience will be a tremendous asset in chambers. I also think his time spending a semester in the chambers of the Honorable

Colleen McMahon in the U.S. District Court for the Southern District of New York will be an added benefit, as I have seen it shape Scott's judgment and maturity in his legal analysis.

In sum, I strongly support Scott's application for a judicial law clerkship. I am happy to discuss my recommendation further and may be reached at (212) 310-8538 or eric.hochstadt@weil.com.

Sincerely,

/s/*Eric Hochstadt*

Eric S. Hochstadt

Luna N. Barrington

office (212) 310-8421
luna.barrington@weil.com

April 11, 2022

Re: Scott Christopher's Application for a Judicial Law Clerkship

Dear Judge:

I am writing on behalf of Scott Christopher to highly recommend him for a clerkship in your chambers. I am a partner in the New York office of Weil, Gotshal & Manges LLP. I have been with the firm since 2012. Prior to joining Weil, I clerked for the Honorable Richard M. Berman in U.S. District Court for the Southern District of New York. I specialize in complex commercial litigation.

I have known Scott Christopher since he joined the firm in September 2019 and have worked with him on several different matters, including a large multi-district antitrust litigation and a pro bono trial involving the Hague Convention. Scott is incredibly bright, hard-working, and diligent. He grasps complex legal issues and always thinks critically of our cases. In the multi-district litigation, Scott is leading the deposition of many of our witnesses. I trust his judgment wholeheartedly because he hones in on strategic and substantive issues. I rely on Scott to lead the team on the most difficult issues.

I strongly support Scott's application for a judicial law clerkship and believe he will be a valuable asset to chambers. I am happy to discuss my recommendation further and may be reached at (212) 310-8421 or luna.barrington@weil.com

Sincerely,

/s/ *Luna Barrington*

Luna N. Barrington

ACME / EAGLE

*Responses to questions 1 through 5 from the European Commission request for information under Article 11(2) of the Merger Regulation (Council Regulation (EC) No 139/2004) regarding the acquisition of sole control of Eagle, Inc. ("**Eagle**") by Acme Industries, Inc. ("**Acme**", and together with Eagle, the "**Parties**") (the "Transaction") of 31 January 2022 addressed to Acme. ("**QP1**")*

*As agreed with the European Commission ("**Commission**") by email dated 9 February 2022, responses to questions 6 through 11 of QP1 will be provided by 28 February 2022.*

1. ***Please provide the Parties' jurisdictional assessment of whether the Transaction is notifiable to the European Commission under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EUMR") and whether it is notifiable in any EEA Member State.***

For the reasons set out below, the Transaction was: (i) not notifiable to the Commission under the EUMR; (ii) not notifiable under the merger control regimes of any EEA Member State; and (iii) not a candidate for referral under Article 22 EUMR. In any event, no Article 22 referral was made within the relevant period under Article 22 EUMR.

The Transaction does not meet the thresholds for notification under the EUMR

The Transaction was not notifiable to the Commission because it did not meet either of the two alternative turnover thresholds under the EUMR.

The first alternative requires "a combined aggregate worldwide turnover of all the undertakings concerned is more than €5,000 million" and "the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million".[1] Acme had global turnover in 2021 of $2.9 billion (€2.45 billion).[2] Eagle was a start-up with zero worldwide turnover in 2021. The Transaction, therefore, did not meet the first alternative turnover threshold.

The second alternative requires, among other things, that the "the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million."[3] As stated above, Eagle had zero worldwide turnover in 2021. Accordingly, the Transaction did not meet the second alternative turnover threshold.

The Transaction does not meet the thresholds for notification to any EEA Member State

The Transaction was not notifiable in any EEA Member State because Eagle had no revenue, assets, users, or employees outside of the U.S. Further, the purchase price of [redacted] [4] is below any alternative reporting threshold in any EEA Member State that

[1] Article 1(2), EUMR.
[2] Based on the official ECB exchange rate of EUR 1:USD 1.1827 for 2021.
[3] Article 1(3)(d), EUMR.
[4] Based on the official ECB exchange rate of EUR 1:USD 1.1601 for October 2021.

applies a threshold based on transaction value. For these reasons, the Transaction does not meet any jurisdictional threshold in any Member State.

The Transaction did not meet the requirements for a referral under Article 22 EUMR

Additionally, no Member State could have requested the Commission to review the Transaction under Article 22 of the EUMR.[5] The Article 22 referral mechanism allows one or more Member States, in certain circumstances, to ask the Commission to review a transaction that does not meet the EUMR thresholds but that (a) affects trade between Member States; and (b) threatens to significantly affect competition within the territory of the Member State or States making the request.[6]

Eagle had a pre-commercial product and was a start-up incorporated and headquartered in the State of Rivendell in the United States with zero revenue. It had zero tangible or intangible assets in the EEA. Eagle only had one product, which was still in the prototyping stage with a total of 3 prototypes made before the Transaction. The product was not in the hands of a single customer in "beta" format and was some way off being commercially available. As such, Eagle had zero nexus to the EEA.

In any event, the Transaction was signed on 30 August 2021 and closed on [redacted]. The implementation of the concentration was made public on [redacted]. No referral request was made by any Member State within the 15 working day period allowed for under Article 22 EUMR.

2. ***Please explain whether the Transaction has been notified to merger control authorities outside of the EEA. If so, please provide a summary of the review status of each authority.***

The U.S. Federal Trade Commission ("**FTC**") contacted Acme in late 2020 to inquire if Acme was going to purchase Eagle, as Eagle was conducting an investment banker-led sale process. The sale process concluded without a buyer. Acme ultimately signed an agreement to acquire Eagle on 30 August 2021. Given the FTC's prior inquiry, Acme notified the FTC that a deal had been reached in principle on 16 July 2021.

The Transaction did not meet the HSR reporting thresholds

The Transaction was not reportable to the FTC because it did not meet the size of person test under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[7] Under the size of person test, a transaction is not reportable if the following two conditions are met:

1) The transaction value is greater than $92 million but less than $368 million; and

2) At least one of the persons involved in the transaction has annual net sales or total assets of $18.4 million or less.[8]

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[5] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.
[6] Acme notes the ongoing appeal in Case T-755/21 – *Illumina v Commission* and reserves its position in relation to the question of whether Article 22 is applicable to transactions that do not meet the respective jurisdictional criteria of the referring Member States.
[7] 15 U.S.C. § 18(a).
[8] Figures as of 31 December 2021.

Acme closed the acquisition of Eagle for [redacted] on [redacted]. As of September 2021, shortly before the Transaction closed, Eagle had zero net sales and total assets of $5 million. Accordingly, the Transaction was not reportable in the United States due to failing to satisfy the size of person test because Eagle had less than $18.4 million in total assets and zero net sales.

The FTC review of the Transaction

On 23 July 2021, the FTC notified Acme that it was conducting a non-public investigation into whether the proposed acquisition of Eagle by Acme may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. On 30 July 2021, the FTC sent both Acme and Eagle Voluntary Access Letters ("**VALs**"), asking for the production of documents related to the proposed transaction. Acme produced documents to comply with the VAL on 4, 9, and 11 August 2021. Acme and Eagle both completed responses to the VALs on 11 August 2021.

Acme notified the FTC on 30 September 2021 that the Transaction would close on or around [redacted] (and no earlier than 11 October 2021). On [redacted], Acme closed the Transaction. On [redacted], the FTC issued a Civil Investigative Demand ("**CID**") to Acme on "whether the proposed acquisition of Eagle, Inc. by Acme Industries, Inc. violates Section 7 of the Clayton Act, 15 U.S. Code § 18, as amended; and/or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended; and whether Commission action to obtain injunctive relief would be in the public interest," with an initial substantial compliance deadline of 22 November 2021. Also on [redacted], the FTC issued a separate CID with the same mandate to Eagle.

On 11 November 2021, Acme notified the FTC that, to certify substantial compliance with the Acme and Eagle CIDs, it would begin producing documents on a rolling basis starting 12 November 2021. Thereafter, in response to developments regarding the FTC's production requests, Acme proposed extending the CID substantial compliance date to 22 February 2022, to which the FTC agreed in a letter dated 22 December 2021. Acme is currently in the process of negotiating an additional extension of the CID substantial compliance date of approximately two months.

To date, Acme has produced documents to comply with the Acme and Eagle CIDs on 17 and 23 November 2021; 7, 14, 21, 22, and 23 December 2021; 21 and 28 January 2022, and 7 February 2022. Acme continues to produce documents on a rolling basis and to work toward certifying substantial compliance with the CIDs.

3. ***In the interest of procedural efficiency, please provide a reciprocal confidentiality waiver to allow the European Commission to discuss the Transaction with other authorities, if any are indicated in reply to Question 2; in particular, the relevant US agencies (the US Federal Trade Commission or Department of Justice).***

As explained above in response to Question 1, there is no nexus between the Transaction and the EEA. We propose a further discussion regarding the basis for a waiver, once the Commission has reviewed and considered the responses to QP1.

4. ***Please explain the strategic rationale for the Transaction. Please include an explanation of Acme's plans concerning Eagle's products and development products post-Transaction.***

Eagle is a life sciences instrumentation company founded in 2016. It currently has no products available in the marketplace, but it has one product under development: the Infinity PCR System ("**Infinity**"). As Infinity complements Acme's existing product offering, it will enable Acme to address additional opportunities in the PCR market. The Parties expect the Transaction to allow Acme to bring Infinity to market by early-2023.

Description of Eagle's Infinity product

Polymerase chain reaction ("**PCR**") is a technique used to exponentially amplify a specific target DNA sequence, allowing for the isolation, sequencing, or cloning of a single sequence. PCR has been elaborated on in many ways since its introduction and is now commonly used for a wide variety of applications including genotyping, cloning, mutation detection, sequencing, microarrays, forensics, and paternity testing.

One example of a PCR application is quantitative PCR ("**qPCR**"). qPCR is a PCR method that amplifies and measures genetic material in real time, and provides relative quantification of the concentration of genetic material in a given sample. Another example of a PCR application is digital PCR ("**dPCR**"). dPCR provides for more sensitive, reliable, and absolute quantification of genetic material by separating the sample into a large number of partitions, and performing the reaction on each partition individually.

Both dPCR and qPCR instruments are used for the same types of research. While qPCR instruments have had significant advantages in terms of cost and automated workflow, they have suffered from lower accuracy. High-end dPCR instruments addressed some of these issues, but did so at the expense of increased cost and lower throughput. As such, sales of high-end dPCR instruments have been limited, with qPCR instruments accounting for the vast majority of sales in the PCR market.

Low-end dPCR instruments are under development, or have been launched, by a number of companies, including Eagle, in order to compete more effectively with qPCR products. Eagle's Infinity product is still in the prototyping stage, but it is envisaged that the launch price of the product will be comparable to the average qPCR system, while offering improved data quality and a more integrated workflow.

Eagle's ability to bring Infinity to market absent the Transaction was, however, highly uncertain. The company was loss-making and expected to run out of cash by the end of 2021. As noted in response to Question 2, Eagle had run a sale process, in which at least 18 prospective acquirers were contacted, which did not result in a buyer, and did not have an alternative realistic path to additional financing prior to the Transaction.

Acme's plans for the Infinity product

The Parties expect the Transaction to allow Acme to bring Infinity to market by early-2023. The Transaction will have significant pro-competitive effects because it provides the financial support, brand recognition and trust, critical manufacturing and supplier relationships, and

technical expertise necessary to continue developing Infinity, all of which Eagle lacked. In the absence of the Transaction, Eagle also faced significant IP risk with a possibility that Infinity would be enjoined from sale. Acme filed a patent infringement action against Eagle and trial was scheduled to begin in 2022.

Acme anticipates that Infinity will compete directly for qPCR users, who will benefit from the increased precision and capabilities of dPCR at a lower price than traditional dPCR instruments. Acme does not currently sell a low-end dPCR instrument. The Transaction increases competition in this growing segment of low-end dPCR instruments by combining Acme's commercial success and technical expertise as an innovator in high-end dPCR products with Eagle's low-end technology, improving the performance and features of instruments in the low-end dPCR market.

The Transaction allows Acme to offer a low-end dPCR product to customers sooner than if it was creating and developing one on its own. This will allow Acme to be better able to compete with recent significant entrants including:

- Echo, which is the market leader in PCR instruments and launched a low-end dPCR product, following its 2021 acquisition of Foxtrot;
- Gulf, which launched its low-end dPCR product in 2020, following its acquisition of Kilo in 2019;
- Sierra, which has publicly announced the launch of a dPCR offering in 2022;
- Tango, a biotechnology company that launched a ground-breaking dPCR solution in 2020 and recently secured additional funding from investors; and
- Zulu, which has recently launched an affordable and high-throughput dPCR system.

Without this Transaction, Acme would have been substantially delayed in commercializing a low-end dPCR product. Before the Transaction, Acme had early stage plans for a product named "Oscar" that would be lower cost than Acme's existing high-end dPCR products. Oscar was only in the "proof of technology" or "breadboard" phase, meaning there was no integrated instrument even as a prototype. By contrast, the Infinity prototype is a single integrated instrument. Thus, Oscar was merely conceptual, and Acme had not yet determined if the technology would ever be functional.

5. ***Please provide an explanation of the basis of Acme's valuation of Eagle. Please at least clarify the role of the following elements in determining the valuation:***

    a) ***Eagle's revenues;***

    b) ***Eagle's tangible assets;***

    c) ***Eagle's intellectual property and other intangible assets; and***

    d) ***Any other element that made a meaningful contribution to Acme's valuation of Eagle.***

Acme acquired all of the equity interests of Eagle for total consideration of [redacted].[9] As Eagle is a development stage company without a commercially available product on the market, it had no revenues at any point prior to the Transaction and limited assets, including cash. Prior to the Transaction, Eagle had raised capital in two rounds of equity fundraising, but the majority of that capital had been spent by October 2021. Eagle's CEO forecasted that Eagle would run out of funds and cease operations by December 2021.

Acme's valuation of Eagle reflects the potential that Acme saw in the Infinity product. Low-end dPCR is a rapidly growing segment of the PCR market, with a significant percentage of current qPCR users expected to switch to low-end dPCR products. As Acme does not currently offer a low-end dPCR instrument, Acme anticipates that Infinity will complement its existing product portfolio and compete directly for qPCR users, who will benefit from the increased precision and capabilities of dPCR at a lower price than traditional dPCR instruments. The Transaction increases Acme's ability to compete in this growing space by combining Acme's expertise in high-end dPCR products with Eagle's low-end technology.

The purchase price is broadly in line with other transactions in the sector, especially when the IP risk is factored into the valuation. For example, Gulf acquired the digital PCR assets of Kilo in an asset acquisition in 2019. Gulf began commercializing fully integrated digital PCR solutions in 2020, combining Gulf technologies with the Kilo assets acquired. Gulf has reported a strong launch, with hundreds of orders and expected sales in the tens of millions in 2021. Gulf has identified digital PCR as one of the fastest growing molecular testing applications in the life systems industry, with a sales opportunity of $300 million plus a "potential conversion opportunity" of approximately $2.5 billion in qPCR sales.

* * *

[9] Based on the official ECB exchange rate of EUR 1:USD 1.1601 for October 2021.

Applicant Details

First Name	**Warren**
Last Name	**Chu**
Citizenship Status	**U. S. Citizen**
Email Address	**wc2651@columbia.edu**
Address	**Address** Street **7729 Poppy Ln** City **Fontana** State/Territory **California** Zip **92336** Country **United States**
Contact Phone Number	**6263787046**

Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**April 27, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law & the Arts**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Huang, Bert
bhuang@law.columbia.edu
212-854-8334
Harwood, Christopher
charwood@maglaw.com
Metzger, Gillian
gmetzg1@law.columbia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a recently graduated Columbia Law School alum. I write to apply for a clerkship in your chambers beginning in 2024 or any term thereafter.

Enclosed please find a resume, transcript, and writing sample. My writing sample is the appellate brief I wrote for the Harlan Fiske Stone Moot Court. Also enclosed are letters of recommendation from Professor Bert Huang (212-854-8334, bhuang@law.columbia.edu), Christopher Harwood (212-880-9547, charwood@maglaw.com), and Professor Gillian Metzger (212-854-2667, gmetzg1@law.columbia.edu).

Please let me know if I can provide any additional information. I can be reached by phone at 626-378-7046 or by email at warren.chu@columbia.edu. Thank you for your consideration.

Respectfully,

Warren Chu

WARREN CHU
225 E. 34th Street, Apt 5G
New York, NY 10016
wc2651@columbia.edu • 626-378-7046

EDUCATION

Columbia Law School, New York, NY
Juris Doctor, received May 2021
Honors: Butler Fellowship (Half-Tuition Merit Scholarship)
James Kent Scholar, Harlan Fiske Stone Scholar
Activities: *Columbia Journal of Law & the Arts*, Articles and Notes Editor
Research Assistant and Teaching Fellow for Professor Gillian Metzger (Federal Courts, Fall 2020)
Teaching Fellow for Professor Doron Teichman (Criminal Law, Spring 2020)
Asian Pacific American Law Students Association, 1L Representative; Social Chair
California Society, VP of Events
Publications: *WADA Time to Choose a Side: Reforming the Anti-Doping Policies in U.S. Sports Leagues While Preserving Players' Rights to Collectively Bargain*, 44 COLUM. J.L. & ARTS 209 (2021)

University of California, Los Angeles, Los Angeles, CA
Bachelor of Arts in Political Science, *cum laude*, received June 2017
Minor: Film, Television, and Digital Media

EXPERIENCE

Patterson Belknap Webb & Tyler LLP, New York, NY
Litigation Law Clerk September 2021 – Present
Conducting deposition defense and creating preparation materials in a legal malpractice case. Advising on strategy in an SEC enforcement action. Working with pro bono clients in U-Visa immigration cases.

National Public Radio, Washington, D.C.
Office of the General Counsel Intern September 2020 – December 2020
Conducted legal research on data privacy and prepared legal memoranda, contracts, and other legal documents.

Boies Schiller Flexner LLP, New York, NY
Summer Associate (offer extended) May 2020 – July 2020
Assisted with reply brief regarding arbitration jurisdiction. Researched sanctions for potential spoliation of evidence in ongoing employment litigation.

Hon. Margo K. Brodie, U.S District Court for the Eastern District of New York, Brooklyn, NY
Judicial Intern May 2019 – July 2019
Assisted judicial clerks with research on substantive and procedural issues for upcoming litigation. Drafted legal memoranda. Observed court proceedings.

Manatt, Phelps & Phillips LLP, Los Angeles, CA
Conflicts/Intake Clerk May 2017 – July 2018
Completed intake forms for new business for professionals from every Manatt firm around the country. Drafted and completed engagement letters, waivers, and disclosures for professionals to send to clients.

Congresswoman Judy Chu, U.S. House of Representatives, Washington, D.C.
Staff Intern September 2016 – December 2016
Assisted in the research and drafting of responses to pending legislation. Helped organize meetings for the Congressional Asian Pacific American Caucus (CAPAC).

INTERESTS: Jeopardy!, Los Angeles Lakers, Philadelphia Eagles, science fiction, tennis

Registration Services

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registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/19/2021 13:26:05

Program: Juris Doctor

Warren Chu

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L6610-2	Journal of Law and the Arts Editorial Board		1.0	CR
L6274-2	Professional Responsibility	Kent, Andrew	2.0	CR
L8084-1	S. Asian American History and the Law	Ishizuka, Nobuhisa	1.0	CR
L8819-1	S. Public Law Workshop	Bulman-Pozen, Jessica; Metzger, Gillian	2.0	B+
L8661-1	S. Supreme Court	Allon, Devora Whitman; Lefkowitz, Jay	2.0	B+
L6683-1	Supervised Research Paper	Mavroidis, Petros C.	1.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6610-2	Journal of Law and the Arts Editorial Board		1.0	CR
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	B+
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Metzger, Gillian	1.0	CR
L6695-1	Supervised JD Experiential Study	Huang, Bert	3.0	CR
L6822-1	Teaching Fellows	Metzger, Gillian	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8663-1	C. Courts & the Legal Process	Huang, Bert	1.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	CR
L6610-1	Journal of Law and the Arts		0.0	CR
L6675-1	Major Writing Credit	Mavroidis, Petros C.	0.0	CR
L6683-1	Supervised Research Paper	Mavroidis, Petros C.	2.0	CR
L6822-1	Teaching Fellows	Teichman, Doron	3.0	CR
L6701-1	The Media Industries: Public Policy and Business Strategy	Knee, Jonathan; Wu, Timothy	3.0	CR
L6484-1	Trademarks	Beebe, Barton	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	A
L6425-1	Federal Courts	Metzger, Gillian	4.0	A
L6205-1	Financial Statement Analysis and Interpretation	Bartczak, Norman	3.0	A
L6610-1	Journal of Law and the Arts		0.0	CR
L8609-1	S. Fighting Corruption in Sports [Minor Writing Credit - Earned]	Mavroidis, Petros C.; Rodgers, Jennifer	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	A-
L6108-2	Criminal Law	Scott, Elizabeth	3.0	A-
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6369-1	Lawyering for Change	Sturm, Susan P.	3.0	A-
L6121-29	Legal Practice Workshop II	Harwood, Christopher B	1.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Empirical Methods	Holden, Richard	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	A
L6105-5	Contracts	Dari-Mattiacci, Giuseppe	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-29	Legal Practice Workshop I	Harwood, Christopher B; Neacsu, Dana	2.0	HP
L6116-1	Property	Merrill, Thomas W.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	Harlan Fiske Stone	3L
2019-20	James Kent Scholar	2L
2018-19	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	1.0

University of California, Los Angeles
UNDERGRADUATE Student Copy Transcript Report

For Personal Use Only

This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: CHU, WARREN
UCLA ID: 604290413
Date of Birth: 10/05/XXXX
Version: 08/2014 | SAITONE
Generation Date: January 03, 2019 | 07:58:02 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 09/23/2013
COLLEGE OF LETTERS AND SCIENCE

Major:
POLITICAL SCIENCE

Minor:
FILM, TELEVISION, AND DIGITAL MEDIA

Degrees | Certificates Awarded

BACHELOR OF ARTS Awarded June 16, 2017
in POLITICAL SCIENCE
With a Minor in FILM, TELEVISION, AND DIGITAL MEDIA
Cum Laude

Secondary School

MONROVIA HIGH SCHOOL, June 2013

University Requirements

Entry Level Writing	satisfied
American History & Institutions	satisfied

California Residence Status

Resident

Transfer Credit

Institution		Psd
ADVANCED PLACEMENT	1 Term to 10/2013	48.0

Fall Quarter 2013

Major:
PREPOLITICAL SCIENCE

INTRO TO EARTH SCI	E&S SCI 1	5.0	18.5	A-
AMERICA 1954-1974	GE CLST 60A	6.0	24.0	A
WORLD POLITICS	POL SCI 20	5.0	18.5	A-

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	61.0	3.813

Winter Quarter 2014

DINOSAURS&RELATIVES	EPS SCI 17	5.0	15.0	B
AMERICA 1954-1974	GE CLST 60B	6.0	19.8	B+
HOLOCAUST-FILM&LIT	GERMAN 59	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	54.8	3.425

Spring Quarter 2014

AMERICA 1954-1974	GE CLST 60CW	6.0	22.2	A-
Honors Content Writing Intensive				
POLITICS & STRATEGY	POL SCI 30	5.0	20.0	A
INTRO-AMERICN PLTCS	POL SCI 40	5.0	16.5	B+

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	58.7	3.669

Fall Quarter 2014

INTR-POLITCL THEORY	POL SCI 10	5.0	18.5	A-
INTRO PSYCHOBIOLOGY	PSYCH 15	4.0	13.2	B+
INTRO-STAT REASON	STATS 10	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	51.7	3.693

Winter Quarter 2015

Major:
POLITICAL SCIENCE

POLITICS&THRY&FILM	POL SCI 113B	4.0	16.0	A
INTL POLT 1914-PRES	POL SCI 138B	4.0	14.8	A-
EVOL-AMER REGULATRY	POL SCI 147C	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Spring Quarter 2015

HIST AM MOTION PIC	FILM TV 106A	6.0	22.2	A-
DIVERSITY&DEMOCRACY	POL SCI 115D	4.0	16.0	A+
POLITICAL PARTIES	POL SCI 142A	4.0	16.0	A+

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	54.2	3.871

Summer Sessions 2015

WRLD PLTCS-W EUROPE	POL SCI 127A	4.0	16.0	A
W EUROPE GOVT&PLTCS	POL SCI 153A	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	8.0	8.0	32.0	4.000

Fall Quarter 2015

SCREENWRTNG FNDMTLS	FILM TV 133	4.0	16.0	A
ELEMENTARY FRENCH	FRNCH 1	4.0	14.8	A-
CRISIS DECSN MAKING	POL SCI 139	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Winter Quarter 2016

FILM AUTHORS	FILM TV 113	5.0	16.5	B+
ELEMENTARY FRENCH	FRNCH 2	4.0	16.0	A
ANGLO-AM LEGAL SYST	POL SCI 145A	4.0	16.0	A
POLITICS & POLICY	UG-LAW 183	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	48.5	3.731

Spring Quarter 2016

FILM EDITING	FILM TV 122D	4.0	16.0	A+
FILM & TV DIRECTING	FILM TV 122M	4.0	16.0	A
ELEMENTARY FRENCH	FRNCH 3	4.0	0.0	P
PLTCS IN MIDLE EAST	POL SCI 157	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	48.0	4.000

Fall Quarter 2016

CAPPP WASHINGTN SEM	POL SCI M191DC	8.0	29.6	A-
WASHDC INTERNSHIP	POL SCI M195DC	4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	29.6	3.700

Winter Quarter 2017

CONSPIRACY THEORIES	COMM ST 105	4.0	16.0	A
PRSPCTVS-DSBLTY STD Writing Intensive	DIS STD 101W	5.0	20.0	A
FILM&TV DEVELOPMENT	FILM TV 183A	4.0	14.8	A-

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	50.8	3.908

Spring Quarter 2017

FREE SPEECH-WORKPLC	COMM ST M172	4.0	16.0	A+
ANIMATION-US FLM&TV	FILM TV 122N	5.0	18.5	A-
POLITICS-TRUMP ERA	POL SCI 186	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	50.5	3.885

UNDERGRADUATE Totals

	Atm	Psd	Pts	GPA
Pass/No Pass Total	9.0	9.0	N/a	N/a
Graded Total	167.0	167.0	N/a	N/a
Cumulative Total	176.0	176.0	633.4	3.793

Total Non-UC Transfer Credit Accepted	48.0
Total Completed Units	224.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

March 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing with great enthusiasm to recommend our recent graduate, Warren Chu. He came to Columbia Law School on a merit scholarship, and in his 2L year, he was named a Kent Scholar, which is our highest honors designation. In the fall semester of that year, just before the pandemic, Warren earned straight A's in four courses on widely varying topics, including in a highly competitive Federal Courts course taught by Professor Gillian Metzger.

Warren is genuine, warm, down-to-earth, and mature—and you can tell from his eyes when his curiosity is piqued and his keen mind is at work on something you've just said. I first got to know him from teaching his Civil Procedure course, where his top-flight exam came as no surprise given his crystal-clear and always on-point answers to cold calls. And in a seminar he also took with me, I could count on Warren to raise sharply reasoned and insightful questions.

That seminar had a somewhat unusual format: for each session, I invited a pair of guest speakers—a professor presenting a new research paper, and a judge acting as the discussant on that paper. In a discussion with a law-and-psychology professor who was presenting a new experimental study about the potential emotional impact of gruesome photographic evidence, Warren noticed that the study had not varied the race of the defendant, a classic factor in such research on juror perceptions. It did make sense to try (as the study did) to test for any psychological effects of the race of the victim in the crime-scene photographs, Warren observed; but when it came to testing the power of curative instructions, he said, it would be remiss not to also experimentally vary the race of the defendant (and to analyze the interactions between both variables) because those effects could easily swamp the more subtle psychological mechanisms by which the tested instructions might dampen a subject's unconscious biases.

Warren's suggestion was a very sophisticated intervention on the researcher's own terms, one that came from a careful analysis of the background literature we had discussed as preparatory readings—and one that the author agreed would need to be taken into account as her research project continues. Moreover, Warren then followed up with a further question, one that showed his facility in smoothly shifting between scanning for devils in the details and a higher-level perspective: If those further experiments were to show that the specified curative instructions were not as effective on some subjects as one might have hoped (perhaps due to the effects of the race of the defendant), he asked, then what other practical solutions might be possible? This was just the sort of challenging question that pushes a research agenda forward—in this case, pressing the author to consider what other interventions should be tested in the study, with an eye to real policy consequences. Having questions like this come up is the very reason I invite researchers to present their works-in-progress to our students, and why they find it rewarding.

I hope you'll find the chance to speak with Warren, as I think you'll enjoy the conversation. He would be an excellent law clerk and a well-liked, highly collegial member of your chambers. Please let me know if I can answer any questions or tell you more. My personal phone is (857) 928-4324 and my email is bhuang@law.columbia.edu. Thank you.

Sincerely,

Bert Huang
Michael I. Sovern Professor of Law
Columbia Law School

March 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in enthusiastic and unqualified support of Warren Chu's application for a clerkship in your chambers. I had the pleasure of having Mr. Chu as a student in my year-long Legal Practice and Writing course during his first year at Columbia, where he excelled. I have since kept in touch with Mr. Chu and watched him continue to excel. He has the tools and temperament to be an exceptional clerk. If given the opportunity, he will not disappoint.

With respect to his legal research and writing, Mr. Chu's performance in my class was exceptional. That Mr. Chu is a superior writer was immediately apparent to me, as even his initial written work required minimal editing, which, in my experience, is unique for a first-year law student. During the first semester of my class—which focuses on legal research and writing—Mr. Chu earned a high pass, which I reserve for the best one or two students in the class. In fact, Mr. Chu was the best researcher and writer in the class, and is among the top students I have ever taught. Mr. Chu's legal memoranda always were well-organized, proceeding from point to point in a clear, concise, and logical way. Having seen a significant amount of written work from Mr. Chu, I can say with great confidence that he will develop into a first-rate written advocate.

Mr. Chu also performed extremely well in connection with the oral advocacy component of my class. The clarity and structure that Mr. Chu brought to his written work carried over to his oral advocacy. Mr. Chu's excellent performance during his oral arguments could only have come from taking the time to learn the record, think through the likely questions he would face, and fashion compelling points to make in response. Mr. Chu also was quick on his feet, deftly handling questions that would have been difficult to predict.

In addition, Mr. Chu was a valuable participant in class. He always seemed to have something constructive to contribute to the discussion. Equally important, Mr. Chu was respectful of his fellow classmates and their points of view. He is easy to talk to, and I always enjoyed our after-class discussions.

Having kept in touch with Mr. Chu, I am aware that, during his second year, he has gained important extracurricular experience while not letting his grades slip. As a member of the Journal of Law & the Arts, Mr. Chu wrote a note that was selected for publication (which was no surprise to me), and he secured a coveted position on the editorial board for next year (also no surprise).

Having gotten to know Mr. Chu and his work, I am certain that he would be a valuable addition to your chambers. Please do not hesitate to contact me if I may be of further assistance in your consideration of Mr. Chu's application.

Respectfully submitted,

/s/ Christopher B. Harwood
Christopher B. Harwood

Christopher Harwood - charwood@maglaw.com

March 15, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Warren Chu, a recent graduate of Columbia Law School, for a clerkship in your chambers. Warren is a very smart and thoughtful law student with a strong academic record here at Columbia. I think he has the makings of an excellent law clerk, and I recommend him enthusiastically.

I first met Warren the fall of his 2L year, when he took Federal Courts with me. He did extremely well, earning a straight A in the course. He wrote a very strong exam that put him in the top group of the class, all the more impressive given that he took the class as a 2L. Warren's participation in class was also impressive. He not only provided correct and clear answers to my questions when on call, but offered thoughtful comments in broader discussions that revealed a good grasp of the material and tensions among different lines of case law. Warren's strong performance in Federal Courts holds true across his time at Columbia. His transcript is impressive, with no grade below a B+ and a transcript that is largely As and A-s.

Given Warren's strong performance in Federal Courts, I was very pleased when he agreed to TA the course the next fall. Warren's help was invaluable as I transitioned the course to a hybrid and on-line format. I particularly appreciated his constant willingness to take on new tasks at the last-minute and his handling of the technological aspects of class. He also provided me with excellent research assistance, doing a deep dive into the jurisprudence of Justice Ginsburg for a memoriam piece I wrote on the Justice. Warren is also took the Public Law Workshop with me and Professor Bulman-Pozen, which this year is focused on the presidency. Though not a frequent volunteer, Warren has made valuable contributions to the class discussion.

Finally, throughout his time at Columbia Law School I've had many occasions to interact with Warren, in office hour meetings and more informally as we worked on putting together AV material for Fed Courts. He is always upbeat and helpful, and I've found working with him to be a pleasure. I am sure he would be a welcome addition to chambers.

Please do not hesitate to reach out to me if there is any further information on Warren I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

WRITING SAMPLE

This writing sample is the appellate brief I wrote in Fall 2020 for the Harlan Fiske Stone Moot Court. I wrote and edited this brief without any outside assistance. I have removed sections written by my partner.

The case involved the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which created the Paycheck Protection Program ("PPP") and authorized banks to process PPP loans for the government. Relator-Appellant Tanya Moore, a Commercial Loan Officer for Confluence Bank, alleged that Confluence was certifying false loan applications to the government. Ms. Moore filed a False Claims Act *qui tam* action against Confluence Bank, which the United States government then moved to intervene and dismiss.

I represented the Relator-Appellant Tanya Moore against the United States government. The case was initially brought in the Northern District of Texas where the court granted a motion to dismiss for the government. My client appealed to the Fifth Circuit.

The question presented here was what standard of review should apply when the government moves to dismiss *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729, and how the Relator-Appellant would fare under the different standards.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENT WAS ENTITLED TO DISMISS RELATOR'S CLAIMS UNDER § 3730(c)(2)(A) BECAUSE THE GOVERNMENT FAILED TO DEMONSTRATE A "VALID GOVERNMENT PURPOSE" THAT IS RATIONALLY RELATED TO DISMISSAL

Under the False Claims Act ("FCA"), the Government has the right to dismiss a relator's *qui tam* action notwithstanding the relator's objections, provided the relator is given notice and the opportunity for a hearing. *See* 31 U.S.C. § 3730(c)(2)(A). However, the FCA is silent on the standard of review a court should adopt when reviewing the government's decision to dismiss. The Fifth Circuit has not yet ruled on this issue, but the Ninth and D.C. Circuits have developed two standards that have guided courts in deciding motions to dismiss under § 3730(c)(2)(A). *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), with *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003). The *Swift* standard is inapplicable in this case. Instead, this Circuit should follow the Ninth Circuit's *Sequoia Orange* standard because it is consistent with precedent and adheres to canons of statutory interpretation.

In *Sequoia Orange*, the Ninth Circuit held that under § 3730 (c)(2)(A), the government must satisfy a two-step test to justify dismissal: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." 151 F.3d at 1145. If the government satisfies the test, the burden shifts to the relator to "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* (internal citations omitted). On the other hand, in *Swift*, the D.C. Circuit held that the FCA granted the government "an unfettered right to dismiss" *qui tam* FCA actions without the possibility of judicial review. 318 F.3d at 252.

This Court reviews a district court's interpretation of the FCA and its determination of the proper standard of review *de novo*. *See United States v. Hegwood*, 934 F.3d 414, 417 (5th

Cir. 2019) (stating that review of the meaning of a federal statute is *de novo*). The district court erred in its application of both standards. *Swift* relies on an interpretation of Federal Rule of Civil Procedure 41(a)(1)(i) that is inapplicable in the instant case, so the district court should have declined to apply it. *See Swift*, 318 F.3d at 253. Additionally, under *Sequoia Orange*, because the Government failed to adequately investigate Relator's claims, it cannot establish that dismissal is rationally related to a valid government purpose. *See* 151 F.3d at 1145.

A. The *Swift* standard should not and does not apply in this action

In *Swift*, the D.C. Circuit read § 3730(c)(2)(A) "to give the government an unfettered right to dismiss an action," which would serve to prevent a court from reviewing the government's decision. 318 F.3d at 252. The *Swift* court based its interpretation of the statute in part on the Federal Rules of Civil Procedure ("FRCP"), noting that Rule 41(a)(1)(i) allows a plaintiff to unilaterally dismiss a civil action without judicial review if the adverse party has not yet filed an answer or a motion for summary judgment. *Id.*; Fed. R. Civ. P. 41(a)(1)(i). The *Swift* court believed that its interpretation of § 3730(c)(2)(A) aligned with Rule 41(a)(1)(i) since the Government was an intervenor-plaintiff and should thus be permitted to unilaterally dismiss the action without judicial review. *Swift*, 318 F.3d at 252.

The *Swift* standard may seem convincing on its face, but its reliance on Rule 41(a)(1) serves to disqualify it from application in the instant case. The Defendants' motion to dismiss, filed two days before the Government filed its motion to dismiss, was converted into a motion for summary judgment once the district court relied upon the Government's exhibit, a matter outside of the pleadings. Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Because Defendants' converted motion for summary judgment was filed before any plaintiff filed a motion to dismiss, the right to unilaterally dismiss without judicial review was extinguished. Fed. R. Civ. P. 41(a)(1)(i).

As such, if this Court were to follow *Swift*'s rationale that "unfettered dismissal" finds its justification from Rule 41(a)(1)(i), then this Court should decline to apply the *Swift* standard. *Swift*, 318 F.3d at 252.

Even if conversion did not occur, this Court should decline to follow the *Swift* standard because by improperly converting the judicial hearing required by § 3730(c)(2)(A) into a "formal opportunity to convince the government not to end the case," it violates a basic canon of statutory interpretation.[1] *Swift*, 318 F.3d at 253; *see Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

1. The district court's consideration of matters outside of the pleadings converted Defendants' motion to dismiss into a motion for summary judgment, which prevents the Government from dismissing the case under *Swift*'s reasoning

Due to *Swift*'s reliance on Rule 41(a)(1)(i), it is inapplicable in the instant case. Rule 41(a)(2) dictates that if a defendant has been served and has either answered or filed a motion for summary judgment, then the action may be dismissed by the plaintiff "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The *Swift* court, as well as other courts that have relied upon Rule 41(a)(1)(i) to support the government's right to dismiss, considered cases that fall under Rule 41(a)(2) and explicitly noted that they may not fall within

[1] Some trial courts have claimed that dicta from previous Fifth Circuit cases indicate that the Fifth Circuit would follow *Swift*. *See, e.g.*, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-CV-767-DPJ-FKB, 2020 WL 2323077, at *5 (S.D. Miss. May 11, 2020) ("the Fifth Circuit has at least foreshadowed, en banc, that *Swift* got it right"); *U.S. ex rel. Nicholson v. Spigelman*, No. 10-cv-3361, 2011 WL 2683161, at *1 (N.D. Ill. July 8, 2011) ("Dicta from the Fifth Circuit is in accord [with *Swift*]."). However, this incorrect conclusion is based on two lines, one from *Searcy v. Philips Elecs. N. Am. Corp.*, which stated that "[a]pparently, a relator 'conducts' an action even though the government retains the power to take the more radical step of unilaterally dismissing the defendant" and one from *Riley v. St. Luke's Episcopal Hosp.,* which said "the powers of a *qui tam* relator to interfere in the Executive's overarching power to prosecute and to control litigation are seen to be slim indeed when the *qui tam* provisions of the FCA are examined in the broad scheme of the American judicial system." *Searcy*, 117 F.3d 154, 160 (5th Cir. 1997); *Riley*, 252 F.3d 749, 756 (5th Cir. 2001). This is hardly conclusive evidence that the Fifth Circuit "foreshadowed" that *Swift* was correctly decided. It is, first and foremost, dicta, and second, decided years before *Swift* had even come down.

the scope of their decisions. *See Swift*, 318 F.3d at 252–53 ("If the government tried to have an action dismissed after the complaint had been served and the defendant answered, it might be subject to Rule 41(a)(2)."); *United States v. UCB, Inc.*, 970 F.3d 835, 850 (7th Cir. 2020) ("Not every case, though, will be like this one. For example, if the conditions of Rule 41(a)(2) do not apply, an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.") (internal quotations omitted).

While Defendants neither answered nor filed a motion for summary judgment, the Government filed a motion to dismiss two days after the Defendants' filed their motion to dismiss. Defs. Mot. to Dismiss, R. at 73; Gov. Mot. to Dismiss, R. at 73. Ordinarily, a motion to dismiss is not an action that would prevent a plaintiff from voluntarily dismissing its own claims. *See Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977). However, the government attached an exhibit to its motion to dismiss, and the district court considered this exhibit in deciding the merits of the case, thus converting the Defendants' motion to dismiss into a motion for summary judgment under Rule 12(d). Gov. Mot. to Dismiss, R. at 79–81; Fed. R. Civ. P. 12(d). This conversion is consistent with Fifth Circuit precedent, which has held that a 12(b)(6) motion to dismiss is converted into a motion for summary judgment when "the trial court [is] presented with, and [does] not exclude, matters outside the pleadings" and that "[f]or the purposes of Rule 41(a)(1), a converted 12(b)(6) motion to dismiss will be treated as a motion for summary judgment." *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661 (5th Cir. 1979); *see also In re LaChance*, 209 F.3d 720 (5th Cir. 2000) ("We have held that for purposes of Rule 41, a Rule 12(b)(6) motion becomes a motion for summary judgment unless all extraneous material presented is excluded by the court.").

It is true that the Fifth Circuit has established limits on this conversion, namely that the district court must have actually relied on matters outside of the pleadings before the appellate court should convert a motion to dismiss. *See Sigaran v. U.S. Bank Nat. Ass'n*, 560 F. App'x

410, 415 (5th Cir. 2014) ("The mere presence of those documents in the record, absent any indication that the district court relied on them, does not convert the motion to dismiss into a motion for summary judgment."); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993). However, in this case, the district court below did not just accept the Government's exhibit but actually cited the exhibit in its decision to dismiss on the standard of review issue *and* the merits issues. D. Ct. Order, R. at 97 (referring to Government exhibit to "take the point that some employees acted with unclear intents and potentially base motives"). There is hardly a clearer signal of reliance than an actual citation to the source.

As such, "appellate courts may take the district court's consideration of matters outside the pleadings to trigger an implicit conversion." *Trinity Marine Products, Inc. v. United States*, 812 F.3d 481, 487 (5th Cir. 2016) (internal citations and quotations omitted). This implicit conversion can occur without notice to the parties, so long as they were aware that the court *could* treat the motion to dismiss as a motion for summary judgment by considering matters outside of the pleadings. *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 195 (5th Cir. 1988); *see also Clark v. Tarrant Cty., Texas*, 798 F.2d 736, 746 (5th Cir. 1986).

Because the district court considered matters outside of the pleadings while ruling on Defendants' motion to dismiss on the merits, Defendants' motion to dismiss was retroactively converted to a motion for summary judgment for purposes of Rule 41(a)(1). *See Berry v. ADT Sec. Servs., Inc.*, No. 4:19-CV-24, 2019 WL 6002257, at *3 (S.D. Tex. June 24, 2019) ("[O]nce the court considers outside material in ruling on the motion to dismiss, the motion is treated as a summary judgment motion and the effect goes back to the filing of the motion, thus barring the plaintiff's right to a Rule 41(a)(1) dismissal without prejudice."). The Government filed its motion to dismiss two days after Defendants' converted motion for summary judgment, so Rule 41(a)(2) establishes limits on a plaintiff's voluntary dismissal and Rule 41(a)(1) would

no longer apply. Fed. R. Civ. P. 41(a)(2). Since Rule 41(a)(1) is a central tenet of the *Swift* standard, the Government cannot rely on the *Swift* standard in its attempt to dismiss this case.

2. Following the *Swift* standard would render parts of the FCA superfluous

Even if this Court finds that conversion did not occur, the *Swift* standard should not apply because it renders a section of the FCA meaningless. § 3730(c)(2)(A) explicitly sets out that an FCA *qui tam* action may only be dismissed if "the court has provided the person with an opportunity for a hearing on the motion." Since the *Swift* standard gives the government an "unfettered right to dismissal," it renders the hearing requirement superfluous. In doing so, the *Swift* court violates a basic canon of statutory interpretation as well as decades of Supreme Court precedent. *Hibbs v. Winn*, 542 U.S. 88, 89 (2004) ("the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous"); *see, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) ("the Court rejects an interpretation of the statute that would render an entire subparagraph meaningless."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect . . . to every word Congress used."); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1654 (2017).

Instead of giving effect to every word in § 3730(c)(2)(A), the *Swift* court read the hearing requirement to "simply . . . give the relator a formal opportunity to convince the government not to end the case." *Swift*, 318 F.3d at 253. In this interpretation of the statute, the hearing would not only make judicial action unnecessary, it would actually forbid it, as the government's right to dismiss would be unreviewable. *Id.* at 252. If that were the proper interpretation, Congress would not need to involve the court at all. If Congress had intended to reduce the hearing to a simple meeting between the government and the relator, it would have done so, just as it has done in other statutes in the past. *See, e.g.*, *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 494 (2015) (discussing Title VII's conciliation provision, which demands that

the Equal Employment Opportunity Commission communicate with an employer in some way to achieve an employer's voluntary compliance).

Indeed, Congress enacted the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. REP. 99-345, 1, 1986 U.S.C.C.A.N. 5266, 5266. It is not absurd to read § 3730(c)(2)(A) as the Legislative Branch creating a way for the Judicial Branch to prevent the Executive Branch from abusing delegated legislative power. *See United States v. EMD Serono, Inc*., 370 F. Supp. 3d 483, 489 (E.D. Pa. 2019). The hearing requirement is not an afterthought codifying a meeting time for the Government; it is instead consistent with the essential constitutional scheme of checks and balances. *Id.* It is not the place of the court to rewrite the statute to comport with its interpretation. *See Nat'l Ass'n of Mfrs.*, 138 S.Ct. at 632 ("The Court declines the Government's invitation to override Congress' considered choice by rewriting the words of the statute."); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[T]he Court is not free to rewrite the statute that Congress has enacted.").

Even courts that generally agree with *Swift* have found its interpretation of the hearing requirement troublesome. The Seventh Circuit, in *United States v. UCB, Inc.*, agreed that Rule 41(a)(1)(i) gave the government the right to unfettered dismissal, but noted that it found *Swift*'s interpretation of the hearing requirement "unpersuasive." 970 F.3d at 851. The *UCB* court instead held that a hearing could potentially be held in "exceptional" cases of fraud or an arbitrary or irrational decision by the government, which is just a slightly stricter standard than the Ninth Circuit has adopted. *Id.* at 852; *United States ex rel. Kelly v. Boeing Co*., 9 F.3d 743, 754 (9th Cir. 1993) ("[E]videntiary hearings should be granted when the qui tam relator shows a 'substantial and particularized need' for a hearing."). Regardless of what standard should be adopted for a hearing, it is clear that many courts agree that § 3730(c)(2)(A)'s hearing requirement constitutes some level of judicial review. *See, e.g.*, *Ridenour v. Kaiser-Hill Co.,*

L.L.C., 397 F.3d 925, 935 (10th Cir. 2005) (noting that the court "construe[s] the hearing language of § 3730(c)(2)(A) to impart more substantive rights for a relator" than *Swift*). The *Swift* standard renders sections § 3730(c)(2)(A) superfluous, violating a basic canon of statutory interpretation. This Court should instead choose to give proper effect to Congress' words and decline to follow *Swift*.

B. The *Sequoia Orange* standard should govern this action

Under the *Sequoia Orange* standard, the government must satisfy a two-step test to justify dismissal: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." *See* 151 F.3d at 1145. If the government satisfies the test, then the burden shifts to the relator to "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* (internal citations omitted). This standard is rooted in principles of substantive due process: government action cannot be arbitrary or irrational. *Id.* at 1146. This Court should apply the *Sequoia Orange* standard, not only because *Swift* is inapplicable in this case, but because it is supported by legislative history, is consistent with precedent, and aligns with a basic Constitutional protection.

1. The *Sequoia Orange* standard is supported by legislative history

The *Sequoia Orange* court stated that its two-step standard drew significant support from the Senate Report to the False Claims Amendments Act of 1986, which commented on a draft provision that provided, "[i]f the government proceeds with the action . . . the [relator] shall be permitted to file objections with the court and to petition for an evidentiary hearing to . . . object to any motion to dismiss filed by the Government." *Id.* (citing S. REP. 9-345, 26 1986 U.S.C.C.A.N. 5266, 5266). The Senate Report explained that a hearing would be appropriate "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper

considerations." *Id.* The standard for obtaining a hearing should logically also provide the standard of the judicial review, so it is clear that rational basis should be the standard of review for the Government's decision to dismiss. *See United States v. Acad. Mortg. Corp.*, No. 16-CV-02120-EMC, 2018 WL 3208157, at *3 (N.D. Cal. June 29, 2018), *appeal dismissed*, 968 F.3d 996 (9th Cir. 2020).

The *Swift* court attempted to discount this legislative history by noting that the portion of the cited Senate Report "relate[d] to an unenacted Senate version of the 1986 amendment." *Swift*, 318 F.3d at 253. While this is true, the draft provision was almost identical to the enacted version. In fact, the *Swift* court primarily drew issue with the language in the draft provision that stated "[i]f the Government proceeds with the action," noting that the "whole point here is that the government has not elected to proceed; it has elected to dismiss the case." *Id.* at 253. However, "[i]f the Government proceeds with the action" was not even amended additional language; it was in the statute both before the 1986 amendments and remains a part of the statute today. 31 U.S.C. § 3730(c)(1). The *Swift* court's focus on "proceeds" is misplaced, as the statute presents a binary decision for the government: proceed with the action or decline to take over the action. 31 U.S.C. § 3730(b)(4)(A)–(B). As such, the government necessarily needs to "proceed" before it can move to dismiss, which is in accord with how courts have generally interpreted the statute. *See UCB*, 970 F.3d at 845; *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 519 (6th Cir. 2009) (noting that § 3730(c)(2)(A) only applies when the government has decided to proceed with the action).

Additionally, the enacted language was actually strengthened in favor of the relator, which supports the idea that Congress sought to afford relators some sort of protection from arbitrary decisions by the government. The enacted language does not require the relator to file an objection or to petition for a hearing, instead "provid[ing] the [relator] with an opportunity for a hearing on the motion" when the government moves to dismiss. 31 U.S.C. §

3730(c)(2)(A). Due to the minor differences in the draft provision and the enacted language, *Sequoia Orange* properly relied upon the Senate Report and the standard is supported by the legislative history.

2. The *Sequoia Orange* standard is consistent with Supreme Court and Fifth Circuit precedent that executive action should comport with substantive due process

The *Sequoia Orange* court explained that the two-step test employs the "same analysis . . . [as] determin[ing] whether executive action violate[d] substantive due process." *Sequoia Orange*, 151 F.3d at 1145.[2] This analysis finds support in the Fifth Circuit, which has held that "[e]very law or governmental act must be reasonably related to its end, and thus not 'arbitrary.'" *Brennan v. Stewart*, 834 F.2d 1248, 1256 (5th Cir. 1988); *see also FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996) ("[G]overnment action comports with substantive due process if the action is rationally related to a legitimate government interest."); *Schafer v. City of New Orleans*, 743 F.2d 1086, 1089 (5th Cir. 1984) ("The due process clause, in its substantive sense, requires only that the regulation be reasonably related to a valid governmental purpose."). The Supreme Court has also consistently emphasized this, noting that "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

The *Swift* court contended that *Sequoia Orange*'s holding is contrary to the Supreme Court case *Heckler v. Chaney*, which the *Swift* court interpreted as holding that "arbitrary or irrational" decisions not to prosecute could not violate due process. *Swift*, 318 F.3d at 253. As

[2] The Eleventh Circuit read this to mean that the government's "dismissal may not violate the substantive component of the Due Process Clause. *UCB*, 970 F.3d at 851. This is a misreading of *Sequoia Orange*. The *Sequoia Orange* court explicitly noted that its decision was one of "statutory interpretation." *Sequoia Orange*, 151 F.3d at 1143. The test in *Sequoia Orange* is not necessarily as rigorous as the traditional substantive due process test, and even if it is, "[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory" and "demand[] an exact analysis of circumstances." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998).

the Seventh Circuit noted, "*Heckler* is an imperfect fit for the False Claims Act" because it relied in part on the fact that an agency's inaction generally "does not exercise its coercive power over an individual's liberty or property rights." *UCB*, 970 F.3d at 851. The FCA gives the relator an interest in the lawsuit, so the Government's unilateral dismissal would clearly implicate an individual's property rights.[3] *Id.* Additionally, *Heckler* involved an administrative agency's decision not to enforce in the context of a statute that precluded judicial review, whereas the FCA clearly contemplates judicial review through the hearing requirement. *See Heckler v. Chaney*, 470 U.S. 821, 837 (1985); 31 U.S.C. § 3730(c)(2)(A). Indeed, the Court has previously held that agency decisions not to act or litigate cases can be subject to judicial review for rationality, provided that a statute does not preclude such review. *See, e.g.*, *Dunlop v. Bachowski*, 421 U.S. 560, 561 (1975).

Rational basis review is not something that needs to be written into a statute before a specific executive action may be reviewed; it is instead the standard that lurks in the background governing *all* executive action. So, while Congress may not have explicitly included a standard of review in the statute, Congress did provide room for judicial review. Therefore, it would clearly not be judicial activism to apply a standard that has clear support in both Supreme Court and Fifth Circuit precedent.

C. Because the Government did not adequately investigate Relator's claims, the Government failed to demonstrate that dismissal would be rationally related to a valid government purpose

The district court considered how Relator would fare under the *Sequoia Orange* standard, but it erred in its application. D. Ct. Order, R. at 95. Under the standard, the Government identified resource preservation as its valid government purpose. But by failing to adequately investigate Relator's claims, the Government failed to establish that dismissal

[3] *Heckler* reserved judgment on what was proper if the "agency's refusal to institute proceedings violated any constitutional rights of respondents" as may be the case here. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

bears a rational relationship to its purpose. Even if this Court finds that there was a rational basis, Relator has carried her burden by demonstrating that the investigation was inadequate so as to render dismissal arbitrary.[4] *See Sequoia Orange*, 151 F.3d at 1145 (noting inadequate investigation could render Government's dismissal "arbitrary or capricious").

The Government claims "the allegations lack sufficient merit to justify the cost of investigation and prosecution and [are] otherwise . . . contrary to the public interest." Gov. Mot. to Dismiss, R. at 74. Obviously, the Government may dismiss a meritless case, *see United States v. Fiske*, 968 F. Supp. 1347, 1353 (E.D. Ark. 1997), and it is well-established that the preservation of government resources is a valid government purpose. *See, e.g.*, *Sequoia Orange*, 151 F.3d at 1146; *Health Choice All. LLC ex rel. United States v. Eli Lilly & Co., Inc.*, No. 517CV00123RWSCMC, 2019 WL 4727422, at *3 (E.D. Tex. Sept. 27, 2019). However, the Government failed to fully investigate the Relator's claims and so failed to show that dismissal would be rationally related to either of those purposes.

1. The Government's Motion to Dismiss is not rationally related to curbing meritless claims

This case is substantially similar to *United States v. Academy Mortgage Corp.*, in which the court found the Government had "failed to conduct a full investigation." 2018 WL 3208157 at *2. In *Academy Mortgage*, the Government's investigation consisted solely of an interview with the Relator and a review of her documents, which pertained only to misconduct at the particular branch she worked at, did not involve the senior executives at all, and provided

[4] Despite *Swift* and *UCB*'s suggestion that Rule 41(a)(2) should govern this type of case, Rule 41 was intended to "curb abuses" and eliminate a vexatious plaintiff's "annoying of a defendant". Therefore, it would go against the policy and purpose of Rule 41 to apply it here. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 397 (1990). Because Rule 41 does not apply in this case, this Court should look to the other federal rule regarding dismissal and view this motion with the same considerations that govern a 12(b)(6) motion. *See Sequoia Orange*, 151 F.3d at 1145 ("The district court correctly ruled that Rule 41 did not apply."). According to Fifth Circuit precedent, "a motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (internal quotations and citations omitted); *see also Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (noting there is a "strong framework of policy considerations that militate against granting motions to dismiss"); *IberiaBank Corporation v. Illinois Union Insurance Company*, 953 F.3d 339, 345 (5th Cir. 2020). These principles should guide the Court's decision.

no testimony from employees employed at other locations. *Id.* at *1. The court noted that a "more complete investigation was well within the Government's ability." *Id.* at *2. The same holds in this case.

Based on the Government's exhibit, the Government only substantially investigated the Peak Cuts Barbershop claim. Gov. Mot. to Dismiss, R. at 81. The rest of the Government's investigation relies on documents provided by the Relator with little additional insight. *Id.* at 79–80. There is no mention of investigating other Confluence Bank branches, no mention of senior executives being investigated, and no details on any investigation of any employees other than a sole mysterious mention of an investigation of "Cote and Presh's conduct." *Id.* at R. 80. Additionally, the Government continually mentions "referring [the claims] to the SBA for their review," which raises the question as to why the SBA was not initially consulted. *Id*. Indeed, the Granston Memo from the Justice Department explicitly states that the Government "should consult closely with the affected agency as to whether dismissal is warranted," so as to avoid this situation. Memorandum from the Commercial Litigation Branch, Fraud Section of the U.S. Dep't of Just. (Jan. 10, 2018) at 8 (hereinafter "Granston Memo").

It is also worth noting that the Government investigated this case for fewer than three months, which falls far short of other cases in which courts have rejected the claim of inadequate investigation. *See, e.g.*, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-CV-767-DPJ-FKB, 2020 WL 2323077, at *9 (S.D. Miss. May 11, 2020) (noting that government had allegedly been investigating for years); *United States v. Gilead Scis., Inc.*, No. 11-CV-00941-EMC, 2019 WL 5722618, at *6 (N.D. Cal. Nov. 5, 2019) (noting that the Government investigated the allegations for over two years). The Granston Memo provides insight into the Government's short turnaround and explains that dismissal under § 3730(c)(2)(A) for lack of merit is "rare" because the government typically does not fully investigate the merits of a case, but rather "investigate[s] a *qui tam* action only to the point

where it concludes that a declination is warranted." Granston Memo at 4. It is clear that the Government did not fully investigate Relator's claims, and as such, cannot dismiss this case due to lack of merit. At the very least, Relator has carried her burden and demonstrated that dismissal due to lack of merit would be arbitrary.

2. The Government's Motion to Dismiss is not rationally related to preserving government resources

As for preservation of government resources, despite the district court stating that "the mere cost of litigation is justification enough for dismissal," there must also be a rational relationship between conserving resources and dismissal. D. Ct. Order, R. at 95. In order to establish that relationship, the Government must have conducted a cost-benefit analysis. *See Acad. Mortg. Corp.*, 2018 WL 3208157 at *3. Even the Granston Memo expects the Government to conduct a cost-benefit analysis, noting that dismissal is warranted when "the government's expected costs are likely to exceed any expected gain." Granston Memo at 6. It would be impossible to contend that the litigation costs outweighs the potential recovery if the question of potential recovery is never broached. After all, the CARES Act was a novel experiment by Congress, so the Government cannot rely on past prosecutions to ascertain potential recovery; the Government would have had to actually take some affirmative action to analyze the potential proceeds from this case. The Government's exhibit contains no such analysis. Considering the numerous allegations of fraud, Confluence Bank's position as one of the top lenders in the country, and the amount that the Justice Department has previously recovered in FCA cases, there is little reason to believe that the potential recovery in this case would not be large enough to justify costs.[5] The Government is not expected to provide a

[5] "The U.S. Department of Justice obtained a record $5.69 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year [2014]." *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, DEPARTMENT OF JUSTICE (Nov. 20, 2014), https://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014. "[T]he department recovered an unprecedented $3.1 billion from banks and other financial institutions involved in making false claims for federally insured mortgages and loans." *Id.*

"particularized dollar-figure estimate," but there is a distinct lack of even a cursory cost-benefit analysis, thus failing the first step of the standard or at least satisfying the burden on the second step. *UCB*, 970 F.3d at 852.[6]

3. The Government's Motion to Dismiss is not rationally related to preventing interference with an agency policy or preference

Finally, the district court mentioned that the "Government also made clear its concerns that bringing this suit would potentially undermine the structure of the CARES Act and the SBA's ability to review PPP claims for misrepresentations or fraud." D. Ct. Order, R. at 95. It is unclear how this suit could undermine the CARES Act or even affect the Small Business Association.[7] The CARES Act involves a limited pool of funds from Congress, so the Relator's interest and the SBA's interest in recovering any fraudulently obtained funds align. The SBA's concern is not the lenders, but rather the businesses receiving the funds. Any lender certifying fraudulent claims should be liable for siphoning funds from struggling small businesses and defrauding the government, which is precisely the purpose of the FCA. Allowing the Government to arbitrarily dismiss this case because of an inadequate investigation disserves struggling businesses that desperately needed the funds that Defendants may have diverted to "businesses that shouldn't have qualified." R. at 67. At the very least, the importance of the CARES Act demands a reason for dismissal that is rationally related to a government purpose. The Government failed do so. This Court should reverse the district court and remand for further proceedings on the merits.

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[6] While the district court in *UCB* faulted the Government for not providing a particularized cost-benefit analysis, the Seventh Circuit found that was not a requirement. 970 F.3d at 852. However, the Government proposed to dismiss the case in *UCB* primarily because the Government had "consistently held that the conduct complained of [was] probably lawful" and not because of litigation costs.

[7] As the Ninth Circuit noted in denying the Government's appeal in *United States v. Academy Mortgage Corp.*, despite the Government's claims otherwise, "[the court] cannot escape the conclusion that the Government's true interest in dismissing this case is what it has repeatedly maintained throughout this litigation: avoiding burdensome discovery expenses in a case the Government does not think will ultimately be worth the cost." *United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1008 (9th Cir. 2020). This is supported by the Government's investigation when they noted that "going after 3D6 would be expensive[.]" Gov. Mot. to Dismiss, R. at 80. This Court should not lend much credence to the claim that this suit may undermine the CARES Act.

Applicant Details

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Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**March 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 4, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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Buss, Emily
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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March 7, 2022

The Honorable Lewis J. Liman
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year student at the University of Chicago Law School and am writing to express my interest in a judicial clerkship for the 2024-2025 term. I can think of no better place to build the foundation of my legal career than your chambers, and I would welcome the opportunity to assist you as a clerk.

My resume, writing sample, transcripts, and letters of recommendation are enclosed for your review. I hope to have the opportunity to interview with you and thank you for your consideration.

Respectfully,

Jess A. Clay

Jess A. Clay

1616 E. 56th Street, Apt. 1008, Chicago, IL 60637 | (214) 991-0988 | jaclay@uchicago.edu

Education

The University of Chicago Law School, Chicago, IL
Candidate for Juris Doctor, June 2022

- Honors: George B. Pletsch Scholarship
- Activities: Hinton Moot Court; Defenders, Co-President, 2020-2021; ACLU, Vice President, 2020-2021; American Constitution Society, Member; Law School Musical, Cast Member

Harvard University, Cambridge, MA
Bachelor of Arts in History and Literature, *cum laude*, with a secondary in Government, March 2018

- Honors: Recommended for High Honors in History and Literature; SHARP-Houghton Library Summer Fellow
- Thesis: *Words of America: John James Audubon and the American Exceptionalism of Ornithological Biography*
- Activities: Harvard Shooting Team, Captain; *Harvard Independent*, Sports Editor

Experience

Office of Senator Cory A. Booker, U.S. Senate Committee on the Judiciary, Washington, DC
Law Clerk, January 2022-May 2022

Office of Senator Richard J. Durbin, U.S. Senate Committee on the Judiciary, Washington, DC
Law Clerk, September 2021-December 2021

- Redlined and researched proposed legislation and federal codes for legislative team
- Wrote memoranda on transcripts, testimony, and nominations for oversight and nominations teams

Public Defender Service for the District of Columbia, Washington, DC
Law Clerk, August 2021-September 2021

- Drafted motions and letters, reviewed discovery, and performed legal research for criminal cases
- Participated in video visits with clients and attended virtual courtroom hearings

Debevoise & Plimpton LLP, New York, NY
Summer Associate, June 2021-August 2021

- Conducted document review, developed chronologies and charts, prepared interview backgrounds, and participated in interviews and meetings for white collar matters and sensitive investigations
- Reviewed case files, drafted motions for compassionate release, and researched caselaw and statutes for pro bono projects

Dallas County Public Defender's Office, Dallas, TX
Summer Intern, August 2020

- Analyzed evidence, researched legal arguments, and drafted defense strategies for a wide variety of criminal cases

Texas RioGrande Legal Aid, San Antonio, TX
Summer Clerk, June 2020-July 2020

- Researched caselaw, drafted motions and requests, and wrote memoranda for staff attorneys engaged in civil litigation, including school policing and racial discrimination cases

Interests

National parks, beekeeping, skeet shooting, creative writing, and birding

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THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Jess Alexander Clay
Student ID: 12249948

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2019
Program Status:Active in Program
J.D. in Law

External Education

Harvard University
Cambridge, Massachusetts
Bachelor of Arts 2018

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law William Baude	3	3	177
LAWS	30211	Civil Procedure I Emily Buss	3	3	180
LAWS	30311	Criminal Law Genevieve Lakier	3	3	176
LAWS	30611	Torts Saul Levmore	3	3	182
LAWS	30711	Legal Research and Writing Patrick Barry Ryan Sakoda	1	1	181

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Richard Mcadams	3	3	176
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Omri Ben-Shahar	3	3	EP
LAWS	30611	Torts Saul Levmore	3	3	182
LAWS	30711	Legal Research and Writing Patrick Barry Ryan Sakoda	1	1	181

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II William Hubbard	3	3	EP
LAWS	30411	Property Lior Strahilevitz	3	3	EP
LAWS	30511	Contracts Douglas Baird	3	3	EP
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Ryan Sakoda	2	2	EP
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	EP

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	41018	Modern Professional Responsibility Mark Nozette	3	3	176
LAWS	44501	Public Land Law Richard Helmholz	3	3	175
LAWS	47201	Criminal Procedure I: The Investigative Process Sharon Fairley	3	3	178
LAWS	53185	Historic Preservation Law Richard Friedman	2	2	182
LAWS	92000	Greenberg Seminars: The West Wing and the Law Sarah Konsky Daniel Hemel	1	1	P

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure William Baude	3	3	178
LAWS	41601	Evidence Emily Buss	3	3	176
LAWS	46010	Toxics, Toxic Torts and Environmental Injustice Req Designation: Meets Writing Project Requirement Mark Templeton	3	3	183
LAWS	52003	Judicial Opinion Writing Robert Hochman Gary Feinerman	3	3	178
LAWS	92000	Greenberg Seminars: The West Wing and the Law Sarah Konsky Daniel Hemel	0	0	P

Date Issued: 04/26/2022

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THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Jess Alexander Clay
Student ID: 12249948

Scott C. Campbell, University Registrar

University of Chicago Law School

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Alison LaCroix	3	3	177
LAWS	43260	Election Law Franita Smith	3	3	174
LAWS	46101	Administrative Law Ryan Doerfler	3	3	177
LAWS	51302	Law and Politics: U.S. Courts as Political Institutions Gerald N Rosenberg	3	0	
LAWS	92000	Greenberg Seminars: The West Wing and the Law Sarah Konsky Daniel Hemel	0	0	P

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	43230	Public International Law Thomas Ginsburg	3	3	179
LAWS	43282	Energy Law Joshua C. Macey	3	3	177
LAWS	53263	Art Law William M Landes Anthony Hirschel	3	0	
LAWS	53497	Editing and Advocacy Patrick Barry	2	2	P
LAWS	95030	Moot Court Boot Camp James Whitehead Stephen Patton	2	2	P

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Geoffrey Stone	3	3	180
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process David A Strauss	3	0	
LAWS	53264	Advanced Legal Research Sheri Lewis	3	0	

End of University of Chicago Law School

Date Issued: 04/26/2022

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OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

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Revised 09/2016

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Harvard University

Cambridge, Massachusetts 02138

Harvard College

Clay, Jess Alexander
Admitted in 2013
Good Academic Standing

Cabot House
HUID: **60907145**

Degrees Awarded

Degree: Bachelor of Arts
Date Conferred: 03/13/2018
Degree Honors: Cum Laude in Field
Degree Honors: Recommended for High Honors

Academic Program

Concentration: History and Literature
Secondary Field: Government

Beginning of Harvard College Record

2013 Fall

Course	Description	Earned	Grade
ENGLISH 166	American Modernism	4.000	A-
FRSEMR 32V	The Art of Storytelling	4.000	SAT
GOV 30	American Government: A New Perspective	4.000	A
HIST 1300	Western Intellectual History: Greco-Roman Antiquity	4.000	A-

2014 Spring

Course	Description	Earned	Grade
ENGLISH CNFR	Introduction to Creative Nonfiction: Workshop	4.000	A-
EXPOS 20.235	Expository Writing 20	4.000	A-
HIST 1400	Introduction to American Studies	4.000	A
OEB 52	Biology of Plants	4.000	A-

2014 Fall

Course	Description	Earned	Grade
GOV 1074	Political Thought of the American Founding	4.000	A
HAA 65	Baroque Art	4.000	A
HIST 1434	American Public Life in the 20th Century	4.000	A-
SCIPHUNV 12	Natural Disasters	4.000	A-

2015 Spring

Course	Description	Earned	Grade
CULTBLF 35	Classical Mythology	4.000	A
HIST 60J	Empire of Dirt: History of the United States West	4.000	A-
HIST 84E	How to Read a Book	4.000	A
HIST-LIT 97	Tutorial - Sophomore Year	4.000	A

2015 Fall

Course	Description	Earned	Grade
CLS-STDY 97A	Greek Culture and Civilization	4.000	A-
ENGLISH CIJR	Introduction to Journalism	4.000	A
ENGLISH 54	Poets: English Romantic Poets	4.000	B+
GOV 1510	American Constitutional Law	4.000	A-
HIST-LIT 98R	Tutorial - Junior Year	4.000	A-

2016 Spring

Course	Description	Earned	Grade
FRENCH 139B	The 18th Century: Ethical Dilemmas	4.000	A
HIST-LIT 98R	Tutorial - Junior Year	4.000	A-
OEB 190	Biology and Diversity of Birds	4.000	PA
US-WORLD 34	The Civil War from Nat Turner to Birth of a Nation	4.000	A

2016 Fall

Course	Description	Earned	Grade
AESTHINT 20	Poems, Poets, Poetry	4.000	A
GOV 1540	The American Presidency	4.000	B+
HIST 84C	This Old House: A Social and Environmental History	4.000	B+
HIST-LIT 99	Tutorial - Senior Year	4.000	SAT

2017 Spring

Course	Description	Earned	Grade
ENGLISH CPJR	Politics & Journalism	4.000	A-
GOV 50	Introduction to Political Science Research Methods	4.000	B+
HIST-LIT 99	Tutorial - Senior Year	4.000	SAT
MUSIC 194RS	Special Topics: Proseminar	4.000	A

Harvard College Career Totals
Cum GPA: 3.760 **Cum Totals** 132.000 116.000

End of Harvard College Record

Michael P. Burke, Registrar
Not official unless signed

Date Issued: 06/09/2021
Page 1 of 1

March 22, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write today to recommend Jess Clay strongly to you for a clerkship. Jess was an exceptionally strong student in my seminar on Toxics, Toxic Torts, and Environmental Injustice this past Winter Quarter. He conducted archival research—during the pandemic—and wrote an outstanding paper on the groundbreaking environmental justice case Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979). He was well-prepared and contributed meaningfully to class, always advancing our discussions and frequently raising interesting points that I had not considered. In sum, Jess demonstrated the intellect, skills and tenacity that show he would be a strong clerk for you, and I gladly recommend him to you.

Reading an excerpt of the U.S. District Court's decision in Bean for class inspired Jess to look behind the scenes to learn more about the history and results of the case. Bean is generally known as one of the first civil rights challenges to the siting of landfill—in this case, in a Black neighborhood in Houston; it is also known for the proposition that statistical proof can show discriminatory intent in environmental justice cases. But Jess was not satisfied with these general understandings of the case, which are based on Judge McDonald's published ruling on plaintiffs' request for a preliminary injunction. After months of dogged effort, Jess secured the complete case records from the National Archives and Records Administration-Southwest Region. He reviewed thousands of pages of pleadings, exhibits, motions, and unpublished opinions, and, as a result, he was able to tell a fuller story of the case. For example, he described how county officials had rejected a similar landfill proposal a decade earlier when the community was predominantly white. He showed that participants who claimed that they were not aware of the community's racial makeup must have known of it. He described the pressures on Judge McDonald, the first Black female District Court judge in Texas. He showed how the plaintiffs' expert, sociologist and father of the environmental justice movement Robert Bullard, focused his testimony based on direction from Judge McDonald, only to see the case transferred to Chief Judge John Singleton. The latter then found Bullard's analysis to be lacking. Jess discussed the problems with plaintiffs' claims of state action by the waste disposal companies, which most commentators overlook. He also uncovered an unpublished four-page opinion by the U.S. Court of Appeals for the Fifth Circuit, which affirmed Judge Singleton's decision and demonstrated more consideration of the issues than the published, one-word "AFFIRMED" ruling. Ultimately, through his in-depth review of the facts, filings, and findings, Jess determined that the ultimate disposition of the case means that we should all be more skeptical and critical about whether the case stands for the hopeful propositions for which it is known. This paper was genuinely outstanding work. I have encouraged Jess to publish his findings, particularly due to the attention that environmental justice is getting in the popular discourse these days.

I especially appreciated Jess's strong participation during our class discussions because this was the first time that I was offering this course. Because of that, for the class to be successful, I needed students who had read the material closely, could be flexible as the discussion unfolded, could draw connections across the readings, and engaged their classmates. Jess provided all of that and more. I remember well one exchange in which we discussed how and why the form of use of a substance affects whether the U.S. Environmental Protection Agency (EPA) categorizes it as a solid waste, which is necessary to find before determining whether the material is a hazardous waste. During that discussion, Jess dove into the details of the complex Resource Conservation and Recovery Act, its implementing regulations, and EPA's guidance documents, while also being mindful of the broader policy motivations and administrability challenges of the complex regulatory scheme. We also had good discussions about how equity considerations factored into the court's determination about issuing an injunction under the Clean Water Act in the seminal risk-management case Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975) (en banc) and about the implementation of cooperative federalism as both the federal government and state governments regulate conduct that impacts the environment and public health.

Finally, Jess and I had meaningful conversations during office hours. He impressed me during those interactions, asking good questions about the material, pushing me gently on some of my responses, and showing intellectual curiosity and agility. I always looked forward to those discussions and often learned from them.

In sum, Jess has demonstrated the researching, writing, and oral presentation skills that indicate he will be an excellent clerk. He also provided a thoughtful, engaged presence in class and our one-on-one interactions. I highly recommend him to you. Please do not hesitate to contact me at templeton@uchicago.edu or 773-702-6998 if I can be of further assistance.

Respectfully,

Mark N. Templeton
Clinical Professor of Law
Director, Abrams Environmental Law Clinic

Mark Templeton - templeton@uchicago.edu - 773-702-9494

Professor Emily Buss
Mark and Barbara Fried Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
ebussdos@uchicago.edu | 773-834-0007

March 09, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Re: Clerkship Application of Jess Clay

Dear Judge Liman:

I am delighted to have this opportunity to write on behalf of Jess Clay, who is applying for a clerkship in your chambers. I have greatly enjoyed having Jess in two classes. In addition to always being well prepared with a comfortable grasp of the material, Jess added a playfulness to his participation that enlivened the engagement of all of us. To know Jess is to want him on your team.

Jess was in my Civil Procedure class during his first quarter of law school. From the first classes, he helped set an anxious room of 100 students at ease by jumping into the discussion with his characteristic Texas charm. Jess was always on top of the material and ready to express his thoughts, but he was also generous in sharing the conversation with his classmates.

I got to know Jess outside of class, and in those informal conversations, I learned about his family's ranch (now complete with goal posts for the annual Thanksgiving football game). I initially assumed that he was from generations of wealthy Texans and that his Harvard college degree was an impressive but predictable part of his pedigree. I later learned, however, that his father was born in a home with no indoor plumbing and had discovered the world through a set of dog-eared encyclopedias which played an important role in inspiring him to create new opportunities for Jess and his three brothers. Jess attributes his academic opportunities and success to these ambitions of his father, but he also credits his father with instilling in him "the other half" of his education: the half that included hard physical labor on their ranch clearing brush and branding steers and that cultivated his close relationship with nature.

I taught Jess again in his second year during the COVID-19 pandemic. He was one of the students who chose to attend in person in my hybrid (in person and on-line) Evidence class. The class studied evidence through a set of problems built upon a fictional case file. To help set students up for this work, I asked them to come to

the first class prepared to give an opening statement that anticipated the evidence they would seek to admit for their assigned side and that tied the evidence to their theory of the case. The constraints of the pandemic and hybrid teaching led me to set my expectations low for these opening statements, but when I called on Jess randomly to start things off, he gave such an impressive opening that there was little left for me or his classmates to add. I referred back to his opening statement throughout the quarter to help students keep their bearings as we worked through our application of the Rules of Evidence to the voluminous materials in the case file.

Jess is a man of many interests and talents. He is an avid birder whose accomplishments span from mastering various bird calls to writing an honors thesis on John James Audubon. He has been active in the law school community in a broad range of organizations. Jess has not written papers for me, but I have seen a sample of his writing that makes clear to me that he is an extraordinarily gifted writer. Jess is also just a really friendly and playful guy who is exceptionally fun to be around.

Jess would bring smarts, hard work, and infectious charm to his work as a clerk. I hope you will have the pleasure of getting to know Jess and the benefit of his skilled and conscientious work on your behalf.

If I can be of any additional assistance in your consideration of Jess's application, please do not hesitate to contact me by email at ebussdos@uchicago.edu or by phone at (312) 493-8949.

Sincerely,

Emily Buss
Mark & Barbara Fried Professor of Law

Jess A. Clay
1616 E. 56th Street, Apt. 1008, Chicago, IL 60637 | (214) 991-0988 | jaclay@uchicago.edu

WRITING SAMPLE

This writing sample is a judicial opinion I wrote for a judicial opinion writing class. In writing this opinion, I reviewed the district court opinion and the record of a real case pending before the United States Court of Appeals for the Seventh Circuit. I wrote my opinion prior to the publication of the Seventh Circuit's final opinion. Although the class discussed my opinion, this writing sample was written and edited by me alone.

In the
United States Court of Appeals
For the Seventh Circuit

No. 20-2803

MICHELLE JAUQUET, individually
and as legal guardian of I.R.,
her minor child,

Plaintiff-Appellant,

v.

GREEN BAY AREA CATHOLIC EDUCATION, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin, Green Bay Division.
No. 1:20-cv-00647 – **William C. Griesbach**, *Judge*.

ARGUED FEBRUARY 12, 2021 – DECIDED FEBRUARY 15, 2021

Before ABWELL, CLAY, and BAKER, *Circuit Judges*.

CLAY, *Circuit Judge*. GRACE operates a system of Catholic schools in the Green Bay area. Michelle Jauquet's daughter, I.R., attended eighth grade at a GRACE school. Following a series of bullying incidents involving I.R. and subsequent interactions with GRACE administrators, Jauquet filed suit against GRACE in federal court under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). The district court held that Jauquet failed to state a claim and granted GRACE's motion to dismiss. We reverse and remand.

I

GRACE operates Catholic schools and receives federal funding assistance, including funding through the National School Lunch Program. That funding subjects GRACE schools to Title IX. During the 2019-2020 school year, I.R. attended eighth grade at a GRACE school, Notre Dame of De Pere. In September 2019, several of I.R.'s male classmates began to bully her. B.K. and other boys repeatedly called her a "slut" and a "skinny bitch," but neither I.R. nor Jauquet reported the incident to the Notre Dame administration for fear of retaliation toward I.R.

In December, B.K. engaged in a variety of sexually suggestive and vulgar behaviors via social media and texting. Although her daughter was not specifically targeted, Jauquet was nevertheless concerned. Jauquet discussed some of this behavior on December 11 with Molly Mares, the principal of Notre Dame. On December 14, B.K. began a Snapchat conversation with others in which they body-shamed I.R. and told her "if you weren't 50 pounds you would be hot." Jauquet requested a meeting with Mares and they met on December 15. Mares said she would look into the matters raised by Jauquet and follow up with her.

On December 16, B.K. proposed an idea to I.R.'s male classmates: "Let's buy [I.R.] a rope and teach her to use it"—suggesting that I.R. kill herself. When I.R. heard about this, she emailed her mother. Jauquet drove to Notre Dame, pulled I.R. out of class, met briefly with Mares, and requested law enforcement be called. Mares instead arranged for a meeting that afternoon with I.R., B.K., and both students' parents. The meeting provided Mares with actual notice of B.K.'s sexual bullying behavior. B.K. issued a rote apology to I.R. at this time, but later wrote I.R. a note in which he apologized again and acknowledged his first apology was insincere.

Although Jauquet requested that Mares expel B.K., Mares instead issued B.K. a three-day suspension. Jauquet then

sought a meeting with Kim Desotell, the president of GRACE. They met on December 17. Desotell supported the decisions made by Mares and upheld the three-day suspension. When Jauquet emailed Mares and Desotell that she would remove her daughters from Notre Dame if B.K. was not expelled, Desotell sent back transfer paperwork. On January 3, 2020, Jauquet once again spoke with Desotell. Once again, Desotell stood by the decision to suspend B.K. but not expel him. I.R. and Jauquet reported no additional issues with B.K. after this date.

Shortly after Christmas break, Notre Dame suspended a male friend of B.K. When Jauquet initially inquired about the suspension, she was refused information. However, on January 8, Desotell and a GRACE board member informed her that the suspension involved a gun reference. After an exchange of questions and criticisms, Desotell eventually sent an email to all eighth-grade boys informing them that bullying was not allowed. On January 10, I.R. met with Mares. While the meeting was helpful in some ways, it also included criticism of Jauquet.

The record reflects significant interfacing and frustration between Jauquet and GRACE administrators. Jauquet ultimately filed suit against GRACE. She brought claims under both Title IX and Wisconsin state law, and she requested the court consider both permanent injunctive orders and monetary damages as relief measures. The district court granted GRACE's motion to dismiss, holding that Jauquet failed to state a claim under Title IX. The court explained that GRACE was not deliberately indifferent to Jauquet's student-on-student sexual harassment claims as a matter of law, causing Jauquet's harassment claim against GRACE to fail. The court also stated that Jauquet failed to state a claim for direct sexual discrimination by GRACE because her allegations were too vague, indefinite, and conclusory. The court then declined to exercise supplemental jurisdiction over Jauquet's state law claims and dismissed them without prejudice. Jauquet raises only her Title IX claims on appeal.

II

We review a district court's grant of a motion to dismiss de novo. *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 879 (7th Cir. 2012). We accept all well-pleaded facts as true, draw reasonable inferences in favor of the plaintiff, and construe the complaint in the light most favorable to the plaintiff. *Id*. In order to survive a motion to dismiss, the complaint must "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Additionally, "[a] plaintiff must plead particularized factual content, not conclusory allegations, that allows the court to plausibly infer the defendant is liable for the alleged misconduct." *Doe v. Columbia Coll. Chicago*, 933 F.3d 849, 854 (7th Cir. 2019).

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." U.S.C. § 1681(a). In this case, Jauquet "must provide some allegations to allow the Court to infer a causal connection between [I.R.'s] treatment and gender bias and raise the possibility of relief under Title IX above the speculative level." *Ludlow v. Nw. Univ.*, 125 F. Supp. 3d 783, 792 (N.D. Ill. 2015).

On appeal, Jauquet makes two arguments arising under Title IX. First, she argues that the district court erred in concluding that GRACE did not act with deliberate indifference to the student-on-student sexual harassment in this case. Second, she argues that the district court erred in dismissing her claims that GRACE practiced sex discrimination.

A

We can easily dispatch Jauquet's attempt to assert a Title IX claim based on student-on-student harassment. The Supreme Court's guidance controls this issue. The Court has

held that in order for a school to be liable for student-on-student harassment, the school must be "deliberately indifferent," among other requirements. *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). For a school's response to be considered "deliberately indifferent" in cases of student-on-student harassment, the response to the harassment must be "clearly unreasonable in light of the known circumstances." *Id*. at 648. The Court also explained that, "[i]n an appropriate case, there is no reason why courts, on a motion to dismiss, … could not identify a response as not 'clearly unreasonable' as a matter of law." *Id*. at 649. Accordingly, on a motion to dismiss, a district court is entitled to identify a school's response as not clearly unreasonable as a matter of law.

We agree with the district court's finding that GRACE was not deliberately indifferent. Jauquet first brought her matters to GRACE's attention in December 2019. By January 10, 2020, GRACE administrators had taken a number of steps in response, including: meeting and speaking with both Jauquet and I.R.; arranging a meeting with B.K. and his parents; suspending B.K.; having B.K. apologize; telling the eighth-grade boys that bullying was prohibited; and offering to move I.R.'s seat in class. The district court properly recognized that, under *Davis*, it was entitled to identify GRACE's response as not clearly unreasonable on a motion to dismiss. The court did just that in this case, and Jauquet's student-on-student harassment claim under Title IX fails accordingly.

B

Jauquet's second argument—that GRACE practiced sex discrimination—is premised on three allegations from her initial complaint. First, she alleged that "[f]emale students are held to a consistently far more restrictive dress code to accommodate what is commonly referred to as 'rape culture,' in which male students are not expected to bear responsibility for controlling sexual arousal or keeping their sexual behaviors within accepted moral or legal

boundaries." Second, she alleged that "[m]any male students, such as B.K., maintain habitual poor or failing grades without apparent actions or repercussions from Notre Dame, while female students, on average, are expected to (and/or do) maintain strong academic performance." Third, she alleged that "[m]ale students benefit from consistent high tolerance of obscene, disrespectful, and disruptive behaviors toward teachers and students both in and outside of the classroom. The lack of response further emboldens students like B.K. to escalate harassing behaviors, including sexual ones." While we agree with the district court's finding that Jauquet's second allegation failed to state a claim, we disagree with the court's assessment of her other two allegations. Those allegations are plausible on their faces, and they are not conclusory.

The district court mischaracterized Jauquet's first allegation about the disparate dress code standards and rape culture. When regarding the dress code standards, the court read too much into Jauquet's allegations. The court stated that the dress code allegation "suggests at most that the school requires a certain degree of modesty in the clothing worn by female students." But that perceived suggestion is false. Nowhere in the pleadings did Jauquet mention modesty, and it was too great a stretch by the court to assume that was what Jauquet meant. Instead, we should read the claim as it was written and consider it true at this stage in litigation. If the school applied dress code standards in a disparate fashion based on sex, it discriminated. Moreover, Jauquet's dress code claim was pled as a fact in advancement of her argument that the dress code accommodates the rape culture present at Notre Dame. We should understand it as such.

While the district court read too much into Jauquet's allegations about dress code standards, it read too little into her connection of the allegations to rape culture. The court stated that the phrase "rape culture" provided "nothing but shock value to the allegation," but failed to recognize that "rape culture" is an established term referring to the sexual

expectations of male students. Indeed, Jauquet gave a concise definition of the concept in the next clause of her complaint. The record of this case features numerous instances which might provide evidence of such a culture. For example, despite GRACE knowing about B.K.'s aggressive sexual behavior, B.K. did not appear to bear any responsibility or suffer any consequences for his behavior prior to his suggestion that I.R. kill herself. While we might infer that GRACE wants its students to bear responsibility for suicide references, its apparent prior failure to discipline B.K. for not keeping his sexual behavior within acceptable bounds lends credence to Jauquet's claim.

Jauquet's third allegation operates in a similar fashion to her first: if male students benefited from consistent high tolerance of bad behaviors, whereas female students did not, then GRACE engaged in discriminatory practices based on sex. In the narrative of the case, we frequently observe GRACE fail to punish bad behavior by male students. B.K. was suspended only after his comments about a rope, and his male friend was suspended only after he made a gun reference. Potential violence thus appears to have been punished, but other behaviors were not. The other male students went entirely unpunished for their roles in the bullying, allowing Jauquet's claim that the school has a higher tolerance for bad behavior in male students to stand.

If Jauquet's allegations had occurred in a vacuum, the district court's holding that the allegations were too vague, indefinite, and conclusory to state a claim might well be warranted. But in this case, Jauquet's allegations were accompanied by a history of words and actions that rendered her claims sufficiently specific, definite, and supported by evidence. The district court thus failed to draw all inferences in favor of the plaintiff that were present within the allegations and the record. Instead of granting GRACE's motion to dismiss, the court should have denied it.

III

Although the district court correctly dismissed Jauquet's Title IX claims based on student-on-student harassment, the court erred in dismissing her Title IX claims of sex discrimination by GRACE. In affirming the district court's rejection of Jauquet's student-on-student harassment claims, we noted that GRACE's response did not need to be perfect—it only needed to disprove deliberate indifference. In a similar vein, Jauquet's claims of sex discrimination by GRACE do not need to be perfect. They need only be good enough to survive GRACE's motion to dismiss at this stage in the litigation—and they are. We REVERSE the dismissal of Jauquet's Title IX claims of sex discrimination against GRACE and REMAND for further proceedings.

Applicant Details

First Name	**Zachary**
Last Name	**Cohen**
Citizenship Status	**U. S. Citizen**
Email Address	**zcohen@jd22.law.harvard.edu**
Address	**Address** Street **1150 Fifth Avenue Apt. 5E** City **New York** State/Territory **New York** Zip **10128** Country **United States**
Contact Phone Number	**9175964271**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2018**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**June 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Ames Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Davidson, Nestor
ndavidson@law.fordham.edu
212-636-6195
Bowie, Nikolas
nbowie@law.harvard.edu
617-496-0888
Barron, David
dbarron@law.harvard.edu
617-496-6137

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ZACHARY E. COHEN

1150 Fifth Avenue, Apartment 5E • New York, NY 10128
zcohen@jd22.law.harvard.edu • (917)-596-4271

March 1, 2022

The Honorable Lewis J. Liman
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

As a third-year student at Harvard Law School, I write to apply for a clerkship for the 2024 term. I came to law school to prepare for a career as a government litigator; what draws me most to your chambers is your experience working on both sides of the "v." I grew up in New York City and will return after clerking in 2022 for the Honorable Danny J. Boggs on the Court of Appeals for the Sixth Circuit.

Attached are my resume, writing sample, law school transcript, and undergraduate transcript. The writing sample is a case comment on a recent D.C. Circuit decision; it appeared in Volume 134 of the *Harvard Law Review*.

You will receive letters of recommendation separately from the following people:

Judge David J. Barron U.S. Court of Appeals for the First Circuit dbarron@law.harvard.edu 617-495-0812	Prof. Nikolas Bowie Harvard Law School nbowie@law.harvard.edu 617-496-0888	Prof. Nestor M. Davidson Fordham Law School ndavidson@law.fordham.edu 212-636-6195

Several experiences in law school have sharpened my legal research and writing skills. I edited chapters and drafted parts of Professor Nikolas Bowie's forthcoming textbook on constitutional law; I also completed several projects for Judge David Barron's casebooks and upcoming lectures. As an executive editor of the *Harvard Law Review*, I am one of the last people to read everything we publish — a job that includes line-editing, cite-checking, and finalizing articles for publication.

I should also mention that I am deaf and have worn hearing aids all my life. One year ago, surgeons activated a cochlear implant in my left ear. While learning to hear again during a pandemic has been challenging, my deafness has always pushed me to listen closely to others. I think this trait has made me a better student, a better writer, and a better person. I hope it will make me a better clerk.

I would welcome the opportunity to join in the important work of your chambers. Thank you for your time and consideration.

Best,
Zachary Cohen

ZACHARY COHEN

1150 Fifth Avenue, Apartment 5E, New York, NY 10128 | zcohen@jd22.law.harvard.edu | (917)-596-4271

EDUCATION

Harvard Law School, Cambridge, MA — Class of 2022
Activities: *Harvard Law Review*, Executive Editor
Tenant Advocacy Project, Student Representative
Project on Predatory Student Lending, Student Attorney
Research Assistant to Judge David Barron & Professors Niko Bowie and Jon Hanson
Teaching Assistant to Professors Jody Freeman and Niko Bowie

Yale University, New Haven, CT — Class of 2018
B.A., *summa cum laude* in History and Political Science; Phi Beta Kappa
Activities: *The Yale Politic*, Editor-in-Chief (managed team of 65 staff writers)
First-Year Outdoor Orientation Trips, Trip Leader (led week-long hiking trips for first-years)

EXPERIENCE

Hon. Danny J. Boggs, U.S. Court of Appeals, 6th Cir., Louisville, KY — Aug. 2022 – Aug. 2023
Law Clerk

Cravath, Swaine & Moore LLP, New York, NY — Summer 2021
Summer Associate

New Yorkers for Donovan, New York, NY — May 2020 – June 2021
Deputy Treasurer
- Ensured mayoral campaign's compliance with New York City's Campaign Finance Board requirements
- Assisted with day-to-day financial, legal, and political demands as needed

New York Attorney General's Office, New York, NY — Summer 2020
Legal Intern, Taxpayer Protection Bureau
- Researched legal issues related to fraud and tax evasion
- Drafted six memos and four subpoenas related to actions brought under the New York False Claims Act

New York Department of Taxation and Finance, Albany, NY — Jan. 2019 – June 2019
Special Assistant to the Commissioner
- Advised Commissioner on state tax policy and New York's FY 2020 budget
- Helped implement state legislation on congestion pricing, cannabis, and property tax relief

Ned Lamont Transition Committee, New Haven, CT — Nov. 2018 – Jan. 2019
Deputy Communications Director
- Drafted the Governor-elect's remarks, including his inaugural address

Rich Cordray for Governor of Ohio, Columbus, OH — May 2018 – Nov. 2018
Deputy Policy Director
- Researched and drafted policy plans on health care, infrastructure, workforce development, and education

Kerry Initiative, Yale Jackson Institute for Global Affairs — May 2017 – May 2018
Kerry Fellow
- Worked with former Secretary John Kerry on projects around climate change, failed states, and diplomacy
- Researched and drafted parts of the Secretary's memoir, "Every Day is Extra"

Tom Perriello for Governor of Virginia, Alexandria, VA — Summer 2017
Speechwriter, Policy Intern
- Drafted speeches for candidate and surrogates; contributed to policy plans and statements

U.S. Senator Charles E. Schumer, Washington, D.C. — Summer 2016
Speechwriting Intern
- Drafted remarks for the Senator on issues ranging from economic development to police brutality

Interests: Dancing (hip-hop and modern); Political Speechwriting; Cartography; Hiking; Reading biographies

Harvard Law School

Date of Issue: February 4, 2022
Not valid unless signed and sealed
Page 1 / 2

Record of: Zachary E Cohen
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2019 Term: August 27 - December 18

1000	Civil Procedure 6 Greiner, D. James	P	4
1001	Contracts 6 Bar-Gill, Oren	P	4
1002	Criminal Law 6 Rabb, Intisar	P	4
1006	First Year Legal Research and Writing 6B Copus, Ryan	H	2
1005	Torts 6 Hanson, Jon	H	4

Fall 2019 Total Credits: 18

Winter 2020 Term: January 06 - January 24

1057	Financial Analysis and Business Valuation Coates, John	CR	3

Winter 2020 Total Credits: 3

Spring 2020 Term: January 27 - May 15

Due to the serious and unanticipated disruptions associated with the outbreak of the COVID19 health crisis, all spring 2020 HLS academic offerings were graded on a mandatory CR/F (Credit/Fail) basis.

1024	Constitutional Law 6 Bowie, Nikolas	CR	4
2310	Federalism and States as Public Law Actors Halligan, Caitlin	CR	2
1006	First Year Legal Research and Writing 6B Copus, Ryan	CR	2
1003	Legislation and Regulation 6 Renan, Daphna	CR	4
1004	Property 6 Singer, Joseph	CR	4

Spring 2020 Total Credits: 16
Total 2019-2020 Credits: 37

Fall 2020 Term: September 01 - December 31

2000	Administrative Law Freeman, Jody	H*	4

* Dean's Scholar Prize

2069	Employment Law Sachs, Benjamin	H	4
2765	Fraud Rakoff, Todd	H	2
2234	Taxation Warren, Alvin	P	4

Fall 2020 Total Credits: 14

Spring 2021 Term: January 25 - May 14

2033	Conflict of Laws Singer, Joseph	H	4
2048	Corporations Hanson, Jon	H	4
2181	Local Government Law Barron, David	P	2
8035	Predatory Lending and Consumer Protection Clinic Bertling, Roger	H	3
2204	Predatory Lending and Consumer Protection Clinical Seminar Bertling, Roger	H	2

Spring 2021 Total Credits: 15
Total 2020-2021 Credits: 29

Fall 2021 Term: September 01 - December 03

2035	Constitutional Law: First Amendment Parker, Richard	P	4
2452	Constitutional Law: Money and the Making of American Capitalism Desan, Christine	H	4
2398	Public Problems: Advice, Strategy, and Analysis Barron, David	H	2
2219	Regulation of Financial Institutions Jackson, Howell	H	4

Fall 2021 Total Credits: 14

Spring 2022 Term: February 01 - April 22

2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
2169	Legal Profession Gordon-Reed, Annette	~	3

continued on next page

Assistant Dean and Registrar

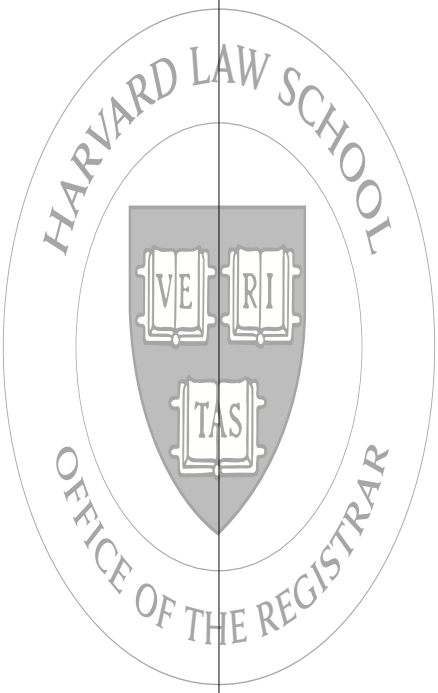
Harvard Law School

Record of: Zachary E Cohen

Date of Issue: February 4, 2022
Not valid unless signed and sealed

2212	Public International Law Blum, Gabriella	~	4
		Spring 2022 Total Credits:	12
		Total 2021-2022 Credits:	26
		Total JD Program Credits:	92

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

YALE UNIVERSITY

Student No: 914127408 Date Issued: 15-FEB-2021

Record of: Zachary Ethan Cohen Page: 1
Issued To: Zachary Cohen
Parchment DocumentID: 32848003

College : Yale College GH 18
Major : History
Major : Political Science

Events: Distinction in Major 1
SUMMA CUM LAUDE
Phi Beta Kappa at Commencement

Degree(s) Awarded :
Bachelor of Arts 21-MAY-2018

SUBJ	NO.	COURSE TITLE	CRED	GRD
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				
High School		Acceleration credit equiv. of		
LATN	ACC1	Accel Credit Latin	2.00	ACV
Fall 2014				
AMST	019	Commodities as U.S. History	1.00	A
ECON	115	Introductory Microeconomics	1.00	A
LATN	411	Early Rome: Aeneas to Romulus	1.00	A-
PLSC	435	IslamToday:Jihad&Fundamentalsm	1.00	A
Spring 2015				
AMST	002	Consumer Culture in 20thC U.S.	1.00	B+
ECON	116	Introductory Macroeconomics	1.00	A
HIST	131	USPolitical&SocialHist,1900-45	1.00	A
PLSC	114	Intro to Political Philosophy	1.00	A-
PLSC	254	Politicl Parties in AmerSystem	1.00	A
Fall 2015				
EP&E	466	Children's Law & Policy	1.00	A
G&G	274	FossilFuels&EnergyTransitions	1.00	A
PLSC	217	U.S. National Elections	1.00	A
STAT	102	IntroStatistics:PolitclScience	1.00	A
Spring 2016				
CSMC	340	Feature Writing Workshop	1.00	CR
HIST	215J	The Art of Biography	1.00	A
HIST	269J	History & Holocaust Testimony	1.00	A
HSAR	115	IntroHistArt:Renaissnc-Present	1.00	A
Fall 2016				
G&G	222	Origin of Everything	1.00	A
HIST	263	Eastern Europe to 1914	1.00	A
HIST	467J	Cartography,Territory&Identity	1.00	A
PLSC	344	Game Theory& Political Science	1.00	A-
PLSC	393	Comparative Constitutional Law	1.00	A

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD
Institution Information continued:				
Spring 2017				
ENGL	121	Thinking&Writing about the Law	1.00	A
HIST	225	Roman Law	1.00	A
HIST	481	Studies in Grand Strategy I	1.00	A
PLSC	227	Refugee Law and Policy	1.00	A
Fall 2017				
ENGL	474	The Genre of the Sentence	1.00	A
EP&E	259	Europe, US, & the Iraq Crisis	1.00	A
HIST	483J	Studies in Grand Strategy II	1.00	A
HIST	495	The Senior Essay	1.00	A
SOCY	357	Neighborhoods and Crime	1.00	A
Spring 2018				
ASL	110	American Sign Language I	1.50	A
CPSC	185	Control, Privacy & Technology	1.00	CR
HIST	134J	Yale and America	1.00	A
HIST	496	The Senior Essay	1.00	A
THST	343	Public Speaking	1.00	A

**********UNDERGRADUATE DEGREE GPA 3.95 **********

Cumulative GPA: 3.95

********** END OF TRANSCRIPT **********

This transcript is printed over a reproduction, in blue ink, of *A Front View of Yale-College*, from a woodcut printed by Daniel Bowen in 1786. The building on the right survives as Connecticut Hall, on Yale's Old Campus.

Emily Shandley, University Registrar

March 17, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to offer my highest and most enthusiastic recommendation for Zachary Cohen, Harvard Law School class of 2022, for a judicial clerkship. After law school, I had the honor to serve twice as a clerk—first with Judge David Tatel on the D.C. Circuit and then with Justice David Souter on the U.S. Supreme Court—and my experience leaves me with absolute confidence that Zach will make a phenomenal addition to your chambers. To preview what I have to say in more detail below, Zach is whip smart, incredibly hard working, and detail-oriented to a fault, not to mention tirelessly warm and positive in his outlook. Truly ideal clerk material.

Because it may seem somewhat unusual for a Fordham faculty member to write a letter of recommendation for a student at another law school, I want to explain how I have gotten to know Zach as well as I have. Last year, Shaun Donovan, who served as Secretary of Housing and Urban Development and then Director of the Office of Management and Budget in the Obama Administration, asked me to serve as treasurer for a campaign he was launching for New York City mayor. I had known and worked with Shaun for many years (my background is in affordable housing law and policy), and I was delighted to take on this role at such a critical time for our city. In addition to overseeing fiscal management, the primary obligation of a treasurer in a New York City campaign involves managing campaign-finance compliance. That requires staying on top of a myriad of detailed rules about contributions and expenditures as well as ensuring accurate and complete records for regular filings with the New York City Campaign Finance Board (CFB), as part of the nation's most extensive (and I venture to say complex) program of public campaign finance.

As the Donovan mayoral campaign began to unfold over the spring of 2020, it became clear that the volume of work required to ensure full compliance was going to be significant and I needed to build a team to help. Zach had been in contact to offer his assistance to the campaign and I brought him on board initially to handle some picayune data-entry tasks, as our interface with the CFB is through an electronic interface. Zach quickly and thoroughly handled everything I threw at him and I found myself giving him more and more work as he cheerfully completed every assignment. It was not long before I asked Zach to serve as my deputy treasurer, with primary responsibility for managing our compliance workflows related to campaign contributions. Even though Zach was also a full-time law student, serving on the Harvard Law Review as an Executive Editor along the way, he never lost focus, tracing a torrent of incoming information, working across silos within the campaign, and building a set of internal data analytic tools that have made our operation run smoothly even as we have significantly ramped up our work as the primary approaches. Zach now takes the lead on a range of critical compliance tasks, including initial drafting of our CFB filings, supervising a growing team of volunteers who report directly to him, and working with staff at the CFB. His work has been exemplary, evincing an eye for detail and a tenacity for follow through that will be critical for the demands of clerking.

We have also had the occasion to encounter some novel questions of campaign finance law in the course of the campaign. Although we have excellent counsel advising us, Zach volunteered—on top of everything else he has been doing—to assist with background research. I was not surprised—how could I be, having seen him in action?—with the thoroughness of the research Zach produced (as always, on short notice, with rapid turnaround) and it was extremely helpful to be able to draw on his research acumen.

One final insight to recount about Zach that I think says a great deal about his character and tenacity. Until we began discussing this recommendation, he had not shared with me the fact that he grew up deaf and had worn hearing aids until just last year, when he received a cochlear implant. Given that we've gotten to know each other during a pandemic in which we have had to interact entirely over Zoom, I hope I can be forgiven for not being aware, even though we are in touch constantly. But knowing now helps explain to me just how carefully and intently Zach truly listens, a rare skill and one that will serve him well throughout his career.

Admittedly, I have not had the chance to have Zach in a class of mine or supervise his academic writing, but I have come to value his insights and counsel deeply as we puzzle through the array of campaign-finance requirements that guide our work together. I have also come to depend without reservation on his ability to keep complex systems moving flawlessly in a high-pressure environment, despite the many demands on his time. He is reliable, calm, and a joy to work with. In short, as I said at the outset, I am delighted to offer my highest and most enthusiastic recommendation for Zach as he pursues a clerkship—he is truly one of the strongest candidates I have seen in nearly fifteen years of recommending students.

Please do not hesitate to contact me if you need any further information.

Sincerely,

Nestor M. Davidson

Nestor Davidson - ndavidson@law.fordham.edu - 212-636-6195

Albert A. Walsh Chair in Real Estate,
Land Use, and Property Law

Nestor Davidson - ndavidson@law.fordham.edu - 212-636-6195

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to recommend Zachary Cohen for a clerkship in your chambers. Zachary is a thoughtful, kind, and analytically rigorous student who I expect will be a fantastic clerk.

I met Zachary (who also goes by Zach) when he was a student in my first-year class on federal constitutional law. Zachary was the most frequent visitor to office hours: he was incredibly eager to talk about the questions that surfaced in class and their implications for other areas of law and policy. Zachary has always been super interested in New York state politics, so he had real-life experiences to draw upon when we discussed federalism and state regulatory power. It was fascinating to watch his mind translate familiar questions of public policy into the novel vocabulary of constitutional law.

Zachary's first-year class began in person, but it transitioned online in the middle of the semester due to the COVID-19 pandemic. Instead of completing the course for a grade, my students completed the course for credit. I expected both changes to compromise my students' ability to participate and understand the material. But I was pleasantly surprised that Zachary and most of the other students remained incredibly engaged despite all the disruption.

I was impressed by Zachary's answer to the final exam. As an exam-writer, I don't believe in complicated hypotheticals; I prefer to confront students with real-life problems to analyze or solve. I took advantage of the pandemic and the absence of grades to write a very challenging exam with three parts. The first part gave students a lengthy excerpt of the CARES Act, the $2.2 trillion stimulus bill passed in March 2020. I asked students whether any provisions of the Act were constitutionally vulnerable and, separately, whether the students thought a state attorney general or public-interest firm should challenge the vulnerable provisions in court. The second part asked students to answer the same two questions with regard to a series of state responses to the COVID pandemic. These responses, all from March and April 2020, included New York's order shutting down businesses, churches, and gun stores; a Wisconsin law prohibiting residents from obtaining medication abortions by mail; a local mandatory face-mask ordinance; and a Maine order requiring the quarantine of out-of-state residents. The third part anticipated that mail-in voting would be a controversial issue in the November 2020 elections. I asked students to write the most effective (yet constitutional) federal law they could think of that would require or induce states to adopt mail-in voting for federal and state elections. I also asked them to explain why a more effective federal law might not be constitutional.

Considering word limits and time limits, it was not possible for any student to simply issue spot or parrot rules. The best exam answers cabined their analysis to the issues they thought were the worthiest of judicial attention. I also expected the best answers would go on to explain how and why preexisting constitutional rules should adapt to the ongoing COVID crisis—recognizing that judicial intervention could undermine fluid and constantly adapting public health measures.
Zachary's answer was excellent. He homed in on the most constitutionally vulnerable state and federal provisions while maintaining a human and realistic appraisal of whether they were worth challenging amid a nationwide pandemic. For example, he observed that Maine's quarantine order raised Negative Commerce Clause and Privileges and Immunities Clause issues, but he argued that a potential litigator should urge Maine's governor to compromise and seek exceptions rather than immediately sue the state government. Zachary also creatively invoked Article I, Section 4, to justify a federal law that mandated mail-in voting for federal elections, while invoking other clauses to mandate mail-in voting for state elections. All in all, given the massive mid-semester changes, I could tell that Zachary emerged from the semester with a deep understanding of constitutional law.

I invited Zachary to serve as one of my research assistants over the summer of 2020. I am in the middle of drafting a casebook on federal constitutional law, and I tasked Zachary with editing chapters, adding new material, proofreading, and clarifying confusing passages. Zachary was professional and thorough; he took the initiative to find additional sources to support various claims, and he added incisive questions for students to answer as they read through the material. I developed a lot of confidence in his work, which I quickly found I did not need to second-guess.

This past spring, Zachary also served as one of the teaching assistants for the constitutional law class. This role asked him to hold office hours for the first-year students and facilitate conversations in the class's online discussion page. When students asked difficult questions, Zachary combed through law review scholarship to find answers. Several students told me how grateful they were that Zachary was so responsive. After a year of having no teaching assistants in the class, I could tell how improved the class was by his participation.

Nikolas Bowie - nbowie@law.harvard.edu - 617-496-0888

I plan to continue asking Zachary to work with me on future projects. I greatly enjoy talking with him about his own interests in state government, and I appreciate that when I ask him a research question, he will thoroughly investigate the answer. He is self-directed and very smart, which makes him a joy to work with. I have no hesitation about his ability to keep up with the workflow or rigor of the federal judiciary. He is incredibly enthusiastic about learning more about the law and litigation, and I expect that he will adapt to chambers life quickly. I recommend him with enthusiasm.

Sincerely,

Nikolas Bowie

Assistant Professor of Law
Harvard Law School

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

March 16, 2021

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

It is my pleasure to recommend Zach Cohen for a clerkship in your chambers. I first got to know Zach when I hired him as a research assistant during the summer following his first year. He did stellar work — he helped formulate case studies and materials for a seminar that I teach with two others from the Kennedy School. In addition, he provided research assistance in connection with my casebook on administrative law, by summarizing cases, editing published opinions to casebook size, and preparing draft notes for the text of the book. The work focuses on issues concerning *Chevron* and statutory interpretation and demanded a fair amount of sophisticated thinking for a first-year law student. Zach excelled in this role. His work was on point, extremely organized, and carefully done. His work was so good that I asked him to assist me on further projects throughout the year, including preparation for a lecture in which he was asked to examine materials both doctrinal and theoretical, bearing on the use of history in legal analysis. Once again, he provided himself to be a superb listener, a clear and efficient writer, and meticulously organized. I have fortunately been able to convince him to stay on as a research assistant for additional projects.

I also have seen Zach's own academic writing — in the form of his recent case for the *Harvard Law Review*, on which he is an editor. It was a thoughtful treatment of a difficult issue in administrative law. I was impressed in discussing the case with him and his ability to both take in suggestions and defend his positions — surely a good sign of what he would be like as a clerk. I am not surprised that he was among the handful of top performers in his Administrative Law class, which is probably as good a barometer of his ability to do the kind of legal analysis that he would be called on to do as a law clerk as any class at Harvard Law School. Finally, Zach was an excellent participant in my Local Government Law class last spring — it was a fairly large class and Zoom made wide-open discussion difficult, but his participation was notably strong throughout. Also, Zach recently participated in a seminar that I taught called Public Problems. He was a thoughtful and engaged participant, and his final paper was a sustained and very well written extended paper. In short, he did extremely well in the class, as I would have expected.

In closing, Zach is an absolute pleasure to work with — he is bright, mature, curious, careful, and very timely. He is one of the best research assistants that I have had in my time in teaching. I am pleased to commend him to you for a clerkship.

Sincerely,

David J. Barron
United States Circuit Judge and the Louis D. Brandeis Visiting Professor of Law

ZACHARY E. COHEN

1150 Fifth Avenue, Apartment 5E • New York, NY 10128
zcohen@jd22.law.harvard.edu • (917)-596-4271

WRITING SAMPLE

Written Fall 2020

Attached is a comment that I wrote on *Ass'n for Community Affiliated Plans v. U.S. Department of the Treasury*, 966 F.3d 782 (D.C. Cir. 2020); it appeared in the February 2021 issue of the *Harvard Law Review*. The D.C. Circuit had upheld an agency rule that expanded the availability of "short-term limited duration insurance" plans, which are exempt from the requirements of the Affordable Care Act. I argued that, while the D.C. Circuit's decision to grant *Chevron* deference was not surprising, it may signal a growing trend of cases where the values underlying *Chevron* actually counsel against such deference.

ADMINISTRATIVE LAW — *CHEVRON* FRAMEWORK — D.C. CIRCUIT UPHOLDS AGENCY RULE EXPANDING EXCEPTION TO AFFORDABLE CARE ACT. — *Ass'n for Community Affiliated Plans v. U.S. Department of the Treasury*, 966 F.3d 782 (D.C. Cir. 2020).

Chevron[1] remains a pillar of administrative law, but it is beginning to crumble.[2] While lower courts continue to uphold agencies' statutory interpretations that reasonably construe ambiguous provisions,[3] the Supreme Court has called into question *Chevron*'s continued relevance.[4] Recently, in *Ass'n for Community Affiliated Plans v. U.S. Department of the Treasury*[5] (*ACAP*), the D.C. Circuit added to this landscape, upholding an agency rule that expanded the availability of "short-term limited duration insurance" (STLDI) plans, which are exempt from the requirements of the Affordable Care Act[6] (ACA).[7] While the D.C. Circuit's decision to grant *Chevron* deference was not surprising, *ACAP* may signal a growing trend of cases where the values underlying *Chevron* actually counsel against such deference.

Since the 1990s, federal law has exempted "short-term limited duration insurance" from most federal health insurance regulations.[8] When Congress passed the ACA in 2010, it incorporated this exemption from the Health Insurance Portability and Accountability Act of 1996[9] (HIPAA), leaving STLDI policies outside the bounds of the ACA's key reforms.[10] But in enacting HIPAA, Congress did not provide an independent definition for "STLDI"; the first such definition came in 2004 from the Departments of Treasury, Labor, and Health and Human

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[1] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[2] *See* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 796–99 (2017); Note, *The Rise of Purposivism and Fall of* Chevron*: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1238–42 (2017).

[3] *See* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 32 (2017); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 37 (2018).

[4] *See, e.g.*, King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (resolving statutory ambiguity outside of the *Chevron* framework); Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment) (raising constitutional concerns with *Chevron*); Michigan v. EPA, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (same).

[5] 966 F.3d 782 (D.C. Cir. 2020).

[6] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[7] *ACAP*, 966 F.3d at 784–85.

[8] *Id.* at 784.

[9] Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S. Code); *see id.* sec. 102(a), § 2791(b)(5), 110 Stat. at 1973 (codified at 42 U.S.C. § 300gg-91(b)(5)) ("The term 'individual health insurance coverage' . . . does not include short-term limited duration insurance.").

[10] *See* ACA § 1551, 124 Stat. at 258 ("[T]he definitions contained in [HIPAA] shall apply with respect to this title.").

Services (Departments).[11] Years later, concerned that cheaper STLDI plans were drawing younger and healthier individuals out of the risk pool for ACA-compliant coverage — and causing premiums to rise — the Departments in 2016 revised their definition of STLDI to cover only plans lasting less than three months.[12]

Days after the 2016 rule was finalized, Donald Trump was elected President.[13] He soon issued two executive orders on the Affordable Care Act: the first sought "the prompt repeal" of the statute;[14] the second, after Congress did not act, highlighted STLDI's exemption "from the onerous and expensive" requirements of the ACA and directed the Departments to consider proposing regulations "to expand the availability of STLDI."[15] The Departments issued a new rule, redefining STLDI to include all plans lasting less than twelve months.[16]

Shortly before the rule took effect, a group of insurance and medical service providers and purchasers[17] filed suit against the Departments.[18] Both sides moved for summary judgment, and the district court granted the Departments' motion.[19] First, the court held that the plaintiffs had competitor standing because, as private insurers selling plans on government exchanges, they competed with STLDI plan providers.[20] Second, the court considered the Departments' rule on the merits under the *Chevron* framework, asking first whether the statutory language was ambiguous[21] and, second, whether the agency's interpretation was a

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11 *See* Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers Under HIPAA Titles I & IV, 69 Fed. Reg. 78,720, 78,748 (Dec. 30, 2004) (defining STLDI as coverage that expires "less than 12 months after the original effective date of the contract").

12 *See* Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75,316, 75,326 (Oct. 31, 2016) (limiting STLDI to plans that expire "less than 3 months after the original effective date of the contract"). "By capping STLDI plans at three months and prohibiting renewals, the Departments hoped to minimize the use of STLDI as a 'primary form of health coverage' . . . ." *ACAP*, 966 F.3d at 786 (quoting 81 Fed. Reg. at 75,317). The regulations also required companies selling short-term policies to warn potential purchasers that they did not satisfy the individual mandate. *See* 81 Fed. Reg. at 75,324.

13 *See* Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury, 392 F. Supp. 3d 22, 28 (D.D.C. 2019).

14 Exec. Order No. 13,765, 82 Fed. Reg. 8,351, 8,351 (Jan. 24, 2017).

15 Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,385–86 (Oct. 17, 2017).

16 Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,242 (Aug. 3, 2018). Such plans can be renewed for a total of thirty-six months, *id.*, and consumers may string together these plans — from the same or different issuers — to last indefinitely, *id.* at 38,222.

17 The plaintiffs were a collection of organizations that (1) provide ACA-compliant individual health coverage, (2) provide various medical services, or (3) purchase ACA-compliant individual health coverage. *See Ass'n for Cmty. Affiliated Plans*, 392 F. Supp. 3d at 26.

18 The plaintiffs contended that the agency action was "arbitrary and capricious" and "contrary to law" under the Administrative Procedure Act. *ACAP*, 966 F.3d at 787.

19 *See Ass'n for Cmty. Affiliated Plans*, 392 F. Supp. 3d at 26.

20 *Id.* at 31.

21 *See id.* at 38–42.

"permissible construction of the statute."[22] The court deemed both inquiries satisfied. Congress could have defined "short-term limited duration insurance" but did not[23] — leaving the phrase ambiguous.[24] The Departments' definition of STLDI was permissible;[25] nothing in HIPAA or the ACA rendered their construction unreasonable.[26]

The D.C. Circuit affirmed.[27] Writing for the panel, Judge Griffith[28] first addressed whether the rule was consistent with federal law; namely, HIPAA's plain text and the ACA's structure and purpose. Under *Chevron*, the panel first identified ambiguity in the phrases "short-term"[29] and "limited duration,"[30] then accepted the Departments' interpretation as a permissible construction of those phrases.[31] Further, the court denied that the rule conflicted with the "spirit" of the ACA.[32] Congress itself had created the STLDI exception, "bak[ing]" it "into the statute itself."[33] And for over a decade, the Departments had defined the term "almost exactly as they do today."[34] They did not, as the plaintiffs asserted, squeeze a "regulatory elephant" into a "statutory mousehole."[35] The panel also rejected the claim that the Departments' rule would undermine the exchanges and thereby frustrate a key reform of the ACA.[36] Consequently, under *Chevron*, the D.C. Circuit found no conflict between the rule and the statutes that the Departments sought to apply.[37]

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[22] *Id.* at 42 (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). After first considering the "Step Zero" question of whether to apply *Chevron*, the court did so, stating that the new STLDI rule did not exceed the regulatory authority delegated to the Departments by Congress. *See id.* at 33, 37–38.

[23] *Id.* at 39.

[24] *Id.* at 39–40.

[25] *Id.* at 43.

[26] *Id.* at 44. In a footnote, the court also denied that the change from the 2016 rule to the current STLDI rule was arbitrary and capricious; the Departments provided a "reasoned basis" for their departure from the 2016 rule and adequately addressed significant objections raised during the 2018 rulemaking. *Id.* at 45 n.16.

[27] *ACAP*, 966 F.3d at 794.

[28] Judge Griffith was joined by Judge Katsas.

[29] *ACAP*, 966 F.3d at 788–89.

[30] *Id.* at 789.

[31] *Id.* at 788.

[32] *Id.* at 790.

[33] *Id.*

[34] *Id.*

[35] *Id.* (quoting Brief for the Appellants at 40 n.15, *ACAP*, 966 F.3d 782 (D.C. Cir. 2020) (No. 19-5212)) ("[A] legislative provision authorizing the Departments to define an entire category of insurance not subject to ordinary federal standards is no 'mousehole.' And a regulation that has only modest effects on the government Exchanges is no 'elephant.'").

[36] *Id.* at 791.

[37] *See id.* at 791–92. The D.C. Circuit also declined to strike down the rule as arbitrary and capricious. *Id.* at 792. The Departments had sufficiently acknowledged and considered the possible effects of the rule, both on the exchanges by raising premiums, *id.*, and on individuals facing coverage gaps, *id.* at 793. The panel also noted that the Departments had provided a "reasoned explanation" for their departure from the 2016 rule. *Id.* at 792 (quoting Encino Motorcars, LLC v.

Judge Griffith concluded by turning to the dissent. Characterizing the dissent's objection to the Departments' rule as a "prudential one," Judge Griffith emphasized the "narrow" role of judges, who could "ensure only that the Departments reasonably exercised the policymaking authority granted to them and not to [the judiciary]."[38] Congress could "take back the reins" and a new President could "revisit the Departments' choice," but the D.C. Circuit could do neither.[39]

Judge Rogers dissented.[40] She began by describing how Congress had enacted the ACA as a "comprehensive statutory scheme" with "interlocking reforms" designed to address longstanding issues of coverage, fair access, and affordability.[41] Even under *Chevron*'s deferential framework, Judge Rogers argued that the ACA's structure rendered impermissible the new definition of "short-term limited duration insurance" for several reasons.[42] First, the rule encourages the use of plans that ultimately provide less than the minimum coverage required under the ACA.[43] Second, the STLDI plans undermine the ACA's commitments to fair access — expressed primarily through its "guaranteed issue" and "community rating" requirements.[44] Finally, the rule draws away younger, healthier individuals, fracturing the "single risk pool" at the heart of the ACA and ultimately compromising the affordability of ACA-compliant insurance.[45] Where Congress in 2010 had understood STLDI as a "limited exemption[]" meant "to fill temporary gaps in coverage,"[46] the Departments in 2018 held them out as a full-blown alternative meant to compete with ACA-compliant plans.[47] Judge Rogers concluded by rejecting the majority's "attempts to defend the Rule as consistent with the ACA."[48]

Navarro, 136 S. Ct. 2117, 2125 (2016)); *see id.* at 792–93 (citing Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212 (Aug. 3, 2018) (noting that the 2016 rule did not "boost enrollment" in ACA-compliant coverage, *id.* at 38,214, and reasoning that the new rule would reduce the uninsured population, *see id.* at 38,228)).

38 *Id.* at 794.

39 *Id.*

40 *Id.* (Rogers, J., dissenting).

41 *Id.* at 795 (quoting King v. Burwell, 135 S. Ct. 2480, 2485 (2015)).

42 *See id.* at 797.

43 *Id.*; *see* KAREN POLLITZ ET AL., KAISER FAM. FOUND., UNDERSTANDING SHORT-TERM LIMITED DURATION HEALTH INSURANCE 2–3 (2018). *See generally* STAFF OF H. COMM. ON ENERGY & COM., SHORTCHANGED: HOW THE TRUMP ADMINISTRATION'S EXPANSION OF JUNK SHORT-TERM HEALTH INSURANCE PLANS IS PUTTING AMERICANS AT RISK (2020).

44 *ACAP*, 966 F.3d at 798 (Rogers, J., dissenting).

45 *Id.* (quoting 42 U.S.C. § 18032(c)(1)).

46 *Id.* at 795–96 (quoting Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,213 (Aug. 3, 2018)).

47 *See id.* at 797.

48 *Id.*

Both the majority and the dissent applied *Chevron* Step Two to the Departments' rule, focusing on whether the agencies had reasonably interpreted "short-term, limited duration insurance" as it appears in the Affordable Care Act. While hardly noteworthy on its own, the move suggests a commitment to the *Chevron* framework that may not withstand closer scrutiny. When agency interpretations subvert, rather than promote, broader democratic values — as the Departments did here — the justifications underlying the *Chevron* framework dwindle. Political accountability, for example, is compromised. So too is agency expertise. Even the legal fiction about congressional intent on which *Chevron* rests seems to collapse. The D.C. Circuit's reflexive application[49] of *Chevron* therefore highlights a tension between the doctrine and the values it purports to protect.

Underlying the *Chevron* framework is the presumption that administrative agencies are healthy institutions that respect "basic norms of good governance."[50] Unlike courts, agencies may "updat[e]" statutes to fit changing circumstances,[51] but they cannot, say, rewrite or sabotage statutes themselves.[52] When agencies abuse their authority — and fail to exercise their delegated authority in a "democratically reasonable fashion"[53] — the justifications for *Chevron* fade.[54] The facts of this case suggest the Departments were concerned less with "fill[ing] up the details"[55] of the Affordable Care Act than with hollowing out its reach.[56] By expanding the criteria through which insurance plans could qualify as STLDI, the Departments' rule fashioned the limited exception into a "long-term form of primary insurance coverage"[57] far beyond the scope

[49] *See* Pereira v. Sessions, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (accusing *Chevron* of producing "reflexive deference," *id.* at 2120).

[50] Coenen & Davis, *supra* note 2, at 830; *see also* Gillian E. Metzger, Essay, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739, 1787 (2015) ("It falls to agencies to develop policy in the face of political dysfunction . . . .").

[51] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006).

[52] *See, e.g.*, William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1545–46 (2019); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 723–25 (2019).

[53] Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765 (2007).

[54] Coenen & Davis, *supra* note 2, at 830 ("If agencies are . . . substituting brute force and nonsensical assertions of power for the good-faith exercise of policymaking expertise, then the case for [*Chevron* deference] . . . becomes considerably more difficult to sustain.").

[55] United States v. Grimaud, 220 U.S. 506, 517 (1911) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

[56] *See* Dylan Scott, *How Trump Gave Insurance Companies Free Rein to Sell Bad Health Plans*, VOX (June 30, 2020, 5:00 AM), https://www.vox.com/2020/6/30/21275498/trump-obamacare-repeal-short-term-health-care-insurance-scam [https://perma.cc/K9BE-3G2D].

[57] *ACAP*, 966 F.3d at 796 (Rogers, J., dissenting).

of what Congress had originally intended.[58] Therefore, *ACAP* may be a case where the values behind *Chevron* deference would have been better served by declining to apply the *Chevron* framework and engaging in de novo statutory review.

One justification for the *Chevron* framework is political accountability: while neither federal judges nor agency heads are democratically elected, the latter make policy choices under the direction of the President, who is elected and held accountable for those decisions.[59] But the Departments' own rationale for their new STLDI rule undercuts this argument. Oversight by the President "endow[s] agencies with a degree of democratic legitimacy" that courts do not enjoy.[60] That presumption of legitimacy, however, is compromised when agencies act in bad faith, not just misconstruing Congress's legislative intent but deliberately subverting its legislative "plan."[61] Congress had such a plan with the Affordable Care Act, writing into the statute itself its aims to "achieve[] near-universal coverage" by "increasing health insurance coverage," "minimiz[ing] . . . adverse selection," and "broaden[ing] the health insurance risk pool to include healthy individuals, which will lower health insurance premiums."[62] As the Departments recognized in their 2016 rule, Congress understood STLDI as a placeholder "to fill temporary gaps" in coverage when transitioning from one job to another.[63] Presenting STLDI as an "affordable alternative" to ACA-compliant insurance, as the Departments did with their new rule, clashes with that understanding and with Congress's express goals.[64] That Congress enacted as comprehensive a statutory scheme as it did suggests it was not

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[58] *See id.* at 798 ("It is difficult to imagine a starker conflict between a statutory scheme and a rule that purports to administer it."); Brief Amicus Curiae of U.S. House of Representatives in Support of Appellants at 13–22, *ACAP*, 966 F.3d 782 (D.C. Cir. 2020) (No. 19-5212) ("The 2018 Rule is a prime example of an action . . . that undermines the Affordable Care Act." *Id.* at 13.).

[59] *See, e.g.*, Evan J. Criddle, Chevron's *Consensus*, 88 B.U. L. REV. 1271, 1288–90 (2008).

[60] Coenen & Davis, *supra* note 2, at 835; *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) ("Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility.").

[61] Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 80, 88 (2015) (distinguishing Congress's "plan" from its legislative purpose).

[62] *See* 42 U.S.C. § 18091(2) (including findings related to the need for an individual mandate).

[63] *ACAP*, 966 F.3d at 795 (Rogers, J., dissenting) (quoting Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75,316, 75,317 (Oct. 31, 2016)).

[64] Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,229 (Aug. 3, 2018). Enrollment in STLDI plans will likely reach 1.9 million by 2022, with most of these individuals "assumed to be enrollees . . . previously covered" in the ACA marketplace. Paul Spitalnic, *Estimated Financial Effects of the Short-Term, Limited-Duration Policy Proposed Rule*, CTRS. FOR MEDICARE & MEDICAID SERVS. 2 (Apr. 6, 2018), https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/STLD20180406.pdf [https://perma.cc/7UA3-TRFV].

interested in creating a broad exception to that scheme. But by deferring to the Departments' interpretation, the D.C. Circuit seemed to punish Congress for not being express enough. Where an agency interpretation exploits ambiguity to disable legislation enacted by 535 elected members of Congress, political accountability fails to justify the *Chevron* framework.

Another justification for *Chevron* rests on expertise: agency interpretations merit deference because agencies have more technical expertise.[65] *Chevron* presumes that agency statutory interpretation is grounded in expert judgment, not purely in politics.[66] But the context in which the new STLDI rule emerged suggests little reliance on expertise. When "partisanship and politicization seep into agency deliberations, we might question the extent to which a given interpretation reflects an informed and considered judgment."[67] Here, the Departments seemed to rely less on expertise and more on an observation from the President that STLDI presented "an appealing and affordable alternative to government-run exchanges."[68] Some policies were not even included in the Departments' proposed rule, leaving stakeholders without an opportunity for comment.[69] What prompted the Departments to act, it seems, was not their shared knowledge of health insurance policy, informed by outside opinion, but rather the White House's concern with the "onerous and expensive insurance mandates and regulations" of the Affordable Care Act.[70] Some scholars have noted an anxiety within the Supreme Court over unchecked executive power "at work in the form of political interference with agency expertise."[71] It appears that something similar happened here. The value of expertise that underlies the *Chevron* framework was not served by applying *Chevron* in this case.

Some would argue *ACAP* presents precisely the kind of case that *Chevron* deference is meant to resolve.[72] Perhaps the D.C. Circuit was right to consider the reasonableness of the Departments' interpretation at *Chevron* Step Two, or it might have asked at Step One whether the

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[65] *See* Anita S. Krishnakumar, *The Anti-messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1476 (2011) (arguing that *Chevron* deference "shields courts from . . . becoming mired in the technical details of a statute's application").

[66] *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87.

[67] Coenen & Davis, *supra* note 2, at 835 (citing Massachusetts v. EPA, 549 U.S. 497, 533 (2007)).

[68] Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,385 (Oct. 17, 2017) (directing the Departments to consider proposing regulations "to expand the availability of STLDI" within sixty days, *id.* at 48,386).

[69] *See generally* Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 7,437 (Feb. 21, 2018) (noting policy allowing renewal of STLDI plans for up to thirty-six months not included in proposed rule).

[70] Exec. Order No. 13,813, 82 Fed. Reg. at 48,385.

[71] Freeman & Vermeule, *supra* note 66, at 95 (discussing *Massachusetts*, 549 U.S. 497).

[72] *Chevron* itself, for example, deferred to an agency policy criticized as deregulatory. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 n.7, 865–66 (1984).

statute's purpose renders the phrase "short-term limited-duration" unambiguous. But the entire framework for deference seems inappropriate when the Departments have acted in bad faith. The Departments not only stretch the duration of short-term insurance plans beyond what Congress intended, but also provide instructions on how to extend those plans indefinitely without triggering federal enforcement. Nothing prohibits insurance providers, the Departments note, from "offering a new short-term, limited-duration insurance policy to consumers who have previously purchased this type of coverage, or otherwise prevent[ing] consumers from stringing together coverage under separate policies . . . ."[73] Under these circumstances, "it may be possible for a consumer to maintain coverage . . . for extended periods of time."[74] The Departments even disclaim their authority to keep individuals or issuers from exploiting these loopholes.[75] To preserve loopholes is one thing; to encourage their exploitation is another, cutting against notions of both political accountability and agency expertise. In applying the *Chevron* framework, the D.C. Circuit seemed to gloss over concerns about how these agencies had exercised their authority.[76]

The Departments' new rule is not the first effort to undermine the Affordable Care Act, nor will it be the last.[77] In 2017, for example, Congress lowered the ACA's "shared responsibility payment" to zero dollars,[78] effectively reducing the Act's individual mandate to an "ineffectual, advisory statement."[79] Whereas that move involved Congress amending its own law, the STLDI rule reveals a not-so-veiled attempt by the executive branch to undermine a law from within. At issue in this case was not that the Affordable Care Act was weakened but how it was done. In responding to instances of political dysfunction, few courts have questioned whether the *Chevron* framework is appropriate.[80] *Association for Community Affiliated Plans* demonstrates the pitfalls of this reflexive application of that framework.

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[73] Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,222 (Aug. 3, 2018).

[74] *Id.*

[75] *Id.* ("The Departments are also significantly limited in their ability to take an enforcement action . . . with respect to such transactions involving products or instruments that are not health insurance coverage.").

[76] *Compare* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (considering whether Congress had delegated interpretive authority to an agency), *with* Bressman, *supra* note 53, at 764–65 (arguing that the Court refused to apply *Chevron* where an agency did not exercise its authority in a "democratically reasonable fashion," *id.* at 765, and discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

[77] *See* Gluck, *supra* note 61, at 63–64 ("[*King v. Burwell*] was an effort to pull the [ACA] apart by concentrating on 'bits and pieces of the law.'" (internal quotation omitted)).

[78] *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

[79] Opening Brief for the United States House of Representatives as Respondent Supporting Petitioners at 34, California v. Texas, No. 19-840 (argued Nov. 10, 2020) (U.S. May 6, 2020).

[80] *See* VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., LSB10204, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*?, at 2 (2018).

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Honorable Judge Lewis J. Liman
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March 27, 2022

Honorable Judge Liman,

My name is Luke Colle. I am an Associate at Ropes & Gray, a recent graduate of Cornell Law School, and a former Executive Editor of the Cornell Journal of Law and Public Policy.

I attended Cornell Law to someday become a U.S. Attorney. So, I have litigated alongside various federal and state agencies, including the U.S. Securities & Exchange Commission and the New York State Attorney General. However, the best training is inside a courthouse. In this light, I would like to clerk for you during the August 2024-25 term.

I offer your chambers plenty of legal research experience. Indeed, the PIABA Bar Journal published my research, which resolves a Circuit split as to whether investors may waive certain Financial Industry Regulatory Authority rights. Moreover, while an Intern at the Securities & Exchange Commission, I spent my time investigating the breadth of the Commission's jurisdiction over cryptocurrency assets. Synthetizing my experience, in the Virginia Business Law Review I am publishing another research article wherein I examine changes in securities clearing and settlement in light of emerging blockchain technologies.

Thank you for your time and consideration. If you have any questions about the attached materials or myself, please let me know.

Respectfully,
Luke Colle

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Activities: Executive Editor, Cornell Journal of Law and Public Policy, Vol. 30
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Adelphi University, Garden City, NY
Bachelor of Arts in Political Science with Honors, Asian Studies Minor, *summa cum laude*, May 2018
GPA: 3.90
Honors: Outstanding Undergraduate Winner, 14th & 15th Annual Adelphi University Research Conferences
W. Grafton Nealley Award for Excellence in Political Science & Most Outstanding Senior
Thesis: "The Negative Income Tax as the Efficient Framework to Address Poverty & Inequality"
Activities: *President*, Pi Sigma Alpha: Political Science Honor Society, Theta Nu Chapter

EXPERIENCE

Ropes & Gray New York, NY
Associate, Strategic Transactions Group October 2021–Present
- Coordinated day-to-day scheduling and workloads of practice teams
- Drafted, revised, and analyzed documents relevant to clients' capital markets disclosure matters
- Researched discrete corporate law issues

New York State Attorney General's Office Syracuse, NY
Intern February 2021–May 2021
- Applied sovereign immunity laws to defend New York State against various private actions
- Developed day-to-day strategies for tackling a trial, briefing attorneys on material developments in the courtroom
- Researched the New York Attorney General's capacity to prosecute public authorities

Ropes & Gray New York, NY
Summer Associate July 2020–August 2020
- Assisted small businesses and sole proprietors in acquiring Small Business Administration loans
- Participated in training seminars about corporate law matters and effective lawyering
- Shadowed attorneys who performed real estate transactional work

U.S. Securities and Exchange Commission New York, NY
Honors Volunteer, Enforcement Division, Cyber Unit: May 2019–July 2019
- Analyzed whether certain cryptocurrencies are securities under the Howey Test
- Briefed attorneys on material information regarding securities fraud from discovery material
- Scrutinized party and witness testimony to determine whether parties implicated securities laws

Adelphi University Garden City, NY
Departmental Assistant: Political Science Department September 2016–May 2018
- Assisted professors with research on migrant agricultural labor, the European migrant crisis, and other topics

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2021 Luke Colle, "An Investor's FINRA Rule 12200 Arbitration Right Supersedes Contrary Forum-Selection Agreements" PIABA Bar Journal, Vol. 28.

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Program: Law					
Plan: Law					
CIVIL PROCEDURE	LAW 5001			3.00	B+
CONSTITUTIONAL LAW	LAW 5021			4.00	B+
CONTRACTS	LAW 5041			4.00	A
LAWYERING	LAW 5081			2.00	B+
PROPERTY	LAW 5121			3.00	A
DEAN'S LIST					
SPRING 2019					
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CIVIL PROCEDURE	LAW 5001			3.00	B+
CRIMINAL LAW	LAW 5061			3.00	A-
LAWYERING	LAW 5081			2.00	B+
TORTS	LAW 5151			3.00	B+
BUSINESS ORGANIZATIONS	LAW 6131			4.00	A-
FALL 2019					
Program: Law					
Plan: Law					
FEDERAL WHITE COLLAR CRIME	LAW 6241			3.00	B+
EVIDENCE	LAW 6401			4.00	B+
LAW, MONEY, FINANCIAL DYN.	LAW 7403			3.00	B+
SECURITIES LAW CLINIC 1	LAW 7953			4.00	A
SPRING 2020					
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NEGOTIATION IN BUS. AND SPORTS	LAW 6898			2.00	B
MORTGAGE AND ASSET SEC.	LAW 7590			3.00	SX

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Program: Law					
Plan: Law					
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FEDERAL INCOME TAXATION	LAW 6441			3.00	S
DEALS SEMINAR: REAL ESTATE	LAW 7169			3.00	A-
SECURITIES LAW CLINIC II	LAW 7954			4.00	A
DEAN'S LIST					
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NEW YORK ATTORNEY GEN. PRAC I	LAW 7925			6.00	SX
SECURITIES LAW CLINIC III	LAW 7955			4.00	A+

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Letter grade values are combined with course credit hours to produce an average based on a 4.3 scale.

For the purpose of computing semester, year or cumulative averages, each letter grade is assigned a quality point value as follows:

A+	= 4.3	B+	= 3.3	C+	= 2.3	D+	= 1.3
A	= 4.0	B	= 3.0	C	= 2.0	D	= 1.0
A-	= 3.7	B-	= 2.7	C-	= 1.7	D-	= 0.7

F = 0

Beginning with Fall term 1983, Law School averages are computed using the following point values:

A+	= 4.33	B+	= 3.33	C+	= 2.33	D+	= 1.33
A	= 4.00	B	= 3.00	C	= 2.00	D	= 1.00
A-	= 3.67	B-	= 2.67	C-	= 1.67	D-	= 0.67

F = 0

There is only one official university transcript for an individual student which represents the complete Cornell University academic record.

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PAGE: 1 of 1

COURSE TITLE	SUBJECT/NUMBER	MEDIAN	TOTAL ENROLLED	UNITS	GRADE
FALL 2018					
Program: Law					
Plan: Law					
CIVIL PROCEDURE	LAW 5001			3.00	B+
CONSTITUTIONAL LAW	LAW 5021			4.00	B+
CONTRACTS	LAW 5041			4.00	A
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